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THE STATE

ELEMENTS OF HISTORICAL AND PRACTICAL POLITICS

BY

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HIS WIFE

Whose Affectionate Sympathy
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Of Preparing
THIS WORK
It is Gratefully Dedicated by
THE AUTHOR

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PREFACE.

The scope and plan of this volume are, I trust, self-evident; but a word or two of comment and suggestion may be useful to those who shall use the book in class instruction. In preparing it I labored under the disadvantage of having no model. So far as I was able to ascertain, no text-book of like scope and purpose had hitherto been attempted. I was obliged, therefore, to put a great deal into this volume that I might have omitted had there been other compact and easily accessible statements of the details of modern governmental machinery. Had there been other books to which the student might easily resort for additional information, I should have confined myself much more than I have felt at liberty to do to the discussion of general principles and the elaboration of parallels or contrasts between different systems. As it was, I saw no way of doing adequately the work I had planned without making this a book of facts.

The volume, as a consequence, is very large. Realizing this, I have put a great deal of matter, containing minor details and most of my illustrations and parallels, into small print, in order that any part of such matter that the teacher saw fit to omit in class work might be omitted without breaking the continuity of the text. At the same time, the small print paragraphs are integral parts of the text, not separated from it as foot-notes would be, but running along with it as continuously as if they were in no way distinguished from the main body of it.

In the historical portions I have been greatly straitened for space, and must depend upon the active and intelligent assistance of the teacher. Picking out governmental facts, as I have done, from the body of political history, and taking for granted on the part of the reader a knowledge of the full historical setting of the facts I have used, I have, of course, been conscious of relying

upon the teacher who uses the volume to make that assumption good as regards his own pupils. Large as the book is, it will require much supplement in the using. I trust that it will on that account prove sufficiently stimulating to both pupil and teacher to make good its claim to be the right sort of a text-book.

The governments I have chosen for description were selected as types of their several kinds. A knowledge of the constitutions of the states of classical antiquity must always go before a study of modern politics; the government of France serves excellently as an example of a unitary government of one kind, and Great Britain equally well as an example of a unitary government of another kind; Germany exhibits a federal empire, Switzerland a federal republic of one sort, the United States a federal republic of another; Austria-Hungary and Sweden-Norway show the only two existing European types of dual monarchies. Russia no doubt has a place apart in European politics, and deserved a chapter in such a survey as I have here undertaken; but I could not in conscience make the volume any bigger. Even two volumes like this could hardly contain the chapters that might be written about the various administrative and constitutional arrangements to be found in Europe.

In hoping that the book will be acceptable to teachers I have relied upon that interest in comparative politics which has been so much stimulated in the English-speaking world in very recent years. I have meant that it should be in time to enter the doors of instruction now in all directions being opened wider and wider in American colleges to a thorough study of political science. I believe that our own institutions can be understood and appreciated only by those who know other systems of government as well, and the main facts of general institutional history. By the use of a thorough comparative and historical method, moreover, a general clarification of views may be obtained. For one thing, the wide correspondences of organization and method in government, — a unity in structure and procedure much greater than the uninitiated student of institutions is at all prepared to find, — will appear, to the upsetting of many pet theories as to the special excellencies of some one system of government. Such correspondences having been noted, it will be the easier to trace the

differences which disclose themselves to their true sources in history and national character. The differences are in many instances nation-marks; the correspondences speak often of common experiences bringing common lessons, often of universal rules of convenience, sometimes of imitation. Certainly it does not now have to be argued that the only thorough method of study in politics is the comparative and historical. I need not explain or justify the purpose of this volume, therefore: I need only ask indulgence for its faults of execution.

The work upon which I have chiefly relied in describing modern governments is the great *Handbuch des oeffentlichen Rechts der Gegenwart*, edited by the late Professor Heinrich Marquardsen of the University of Erlangen. This invaluable collection of monographs on the public law of modern states, which began to appear in 1883, is almost complete. In most cases it embodies the latest authoritative expositions of my subjects accessible to me, and I have used it constantly in my preparation of this work.

To some of my friends I am under special obligations, of which I gladly make grateful acknowledgment, for that most self-sacrificing of services, the critical reading of portions of my manuscript. This kindness was extended to me by Professor Herbert B. Adams and Dr. J. M. Vincent of Johns Hopkins University, Professor J. F. Jameson of Brown University, and Professor Munroe Smith of Columbia College. To these gentlemen I make my public acknowledgments, together with my public condolences, for their connection with this work. I am sure that they are responsible for none of its inaccuracies and for many of its excellences.

WOODROW WILSON.

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I.

THE EARLIEST FORMS OF GOVERNMENT.

1. **Nature of the Question.** — The probable origin of government is a question of fact, to be settled, not by conjecture, but by history. Some traces we can still discern of the history of primitive societies. As fragments of primitive animals have been kept for us sealed up in the earth's rocks, so fragments of primitive institutions have been preserved, embedded in the rocks of surviving law or custom, mixed up with the rubbish of accumulated tradition, crystallized in the organization of still savage tribes, or kept curiously in the museum of fact and rumor swept together by some ancient historian. Limited and perplexing as such means of reconstructing history may be, they repay patient comparison and analysis as richly as do the materials of the archæologist and the philologian. The facts as to the origin and early history of government are at least as available as the facts concerning the growth and kinship of languages or the genesis and development of the arts and sciences. Such light as we can get from the knowledge of the infancy of society thus meagrely afforded us is, at any rate, better than that derived from *a priori* speculations founded upon our acquaintance with our modern selves, or from any fancies, how learnedly soever constructed, that we might weave as to the way in which history might plausibly be read backwards.

2. **Races to be studied: the Aryans.** — For purposes of widest comparison in tracing the development of government it would of course be desirable to include in a study of early society not only those Aryan and Semitic races which have played the chief parts in the history of the European world, but also every primitive tribe, whether Hottentot or Iroquois, Finn or Turk, of whose

institutions and development we know anything at all. Such a world-wide survey would be necessary to any induction which should claim to trace government in all its forms to a common archetype. But, practically, no such sweeping together of incongruous savage usage and tradition is needed to construct a safe text from which to study the governments that have grown and come to full flower in the political world to which we belong. In order to trace the lineage of the European and American governments which have constituted the order of social life for those stronger and nobler races which have made the most notable progress in civilization, it is essential to know the political history of the Greeks, the Latins, the Teutons, and the Celts principally, if not only, and the original political habits and ideas of the Aryan and Semitic races alone. The existing governments of Europe and America furnish the dominating types of to-day. To know other systems which are defeated or dead would aid only indirectly towards an understanding of those which are alive and triumphant.

3. **Semitic and Turanian Instance.** — Even Semitic institutions, indeed, must occupy only a secondary place in such inquiries. The main stocks of modern European forms of government are Aryan. The institutional history of Semitic or Turanian peoples is hardly part of the history of European governments: it is only analogous to it in many of the earlier stages of development. Aryan, Semitic, and Turanian races alike seem to have passed at one period or another through similar forms of social organization. Each, consequently, furnishes illustrations in its history, and in those social customs and combinations which have most successfully survived the wreck of change, of probable early forms and possible successive stages of political life among the others. Aryan practice may often be freed from doubt by Semitic or Turanian instance; but it is Aryan practice we principally wish to know.

4. **Government rested First upon Kinship.** — What is known of the central nations of history clearly reveals the fact that social organization, and consequently government (which is the visible form of social organization), originated in *kinship*. The original bond of union and the original sanction for magisterial authority

were one and the same thing, namely, real or feigned blood-relationship. In other words, families were the original units of social organization; and were at first, no doubt, in a large degree separate. The man and his wife and offspring lived generally apart. It was only by slow stages and under the influence of many changes of habit and environment that the family organization widened and families were drawn together into communities. A group of men who considered themselves in some sort kinsmen constituted the first State..

5. **Early History of the Family; was it originally Patriarchal?** — The origin of government is, therefore, intimately connected with the early history of the family. It is the more unfortunate that the conclusions to be drawn from what is known of the beginnings of the family should furnish matter for much modern difference of opinion. This difference of opinion may be definitely summed up in the two following contrasted views: —

(1) That the *patriarchal* family, to which the early history of the greater races runs back, and with which that history seems to begin, was the family in its original estate, — the original, the true archaic family.

> The patriarchal family is that in which descent is traced to a common male ancestor, through a direct male line, and in which the authority of rule vests in the eldest living male ascendant.

(2) That the patriarchal family, which is acknowledged to be found in one stage or another of the development of almost every race now civilized, was a developed and comparatively late form of the family, and not its first form, having been evolved through various stages and varieties of polyandry (plurality of husbands) and of polygyny (plurality of wives) out of a possibly original state of promiscuity and utter confusion in the relations of the sexes and of consequent confusion in blood-relationship and in the government of offspring.

In brief, it is held on the one hand that the patriarchal family was the original family; and on the other, that it was not the original but a derived form, others of a less distinct organization preceding it.

6. **The Evidence.** — It is of course impracticable to set forth

here the miscellaneous evidence which has been swept together concerning so very obscure and complex a question. Suffice it to say that among many primitive races cases abound of the reckoning of kinship through mothers only, as if in matter-of-course doubt as to paternity; of consanguinity signified throughout the wide circle of a tribe, not by real or supposed common descent from a human ancestor, but by means of the fiction of common descent from some bird or beast, from which the tribe takes its name, as if for lack of any better means of determining common blood; of marriages of brothers with sisters, and of groups of men with groups of women, or of groups of men with some one woman. In the case of some tribes, moreover, among whom polygamy or even monogamy now exists, together with a patriarchal discipline, it is thought to be possible to trace clear indications of an evolution of these more civilized forms of family organization from earlier practices of loose multiple marriages or even still earlier promiscuity in the sexual relation.

The peoples, however, among whom such confusions of sexual relationships have been observed are not those who have emerged upon the European field. Among almost every European folk there is clear, unbroken tradition running back to a patriarchal power and organization. Roman law, that prolific mother of modern legal idea and practice, bears impressed upon every feature of it indubitable marks of its descent from a time when the father ruled as king and high priest in the family. Greek institutions speak hardly less unequivocally of a similar derivation. No belief is more deeply fixed in the traditions of the great peoples who have made modern history than the belief of direct common descent, through males, from a common male ancestor, human or divine; and nothing could well be more numerous or distinct than the traces inhering in the very heart of their polity of an original patriarchal organization of the family as the archetype of their political order.

7. **The Warrantable Conclusion.** — The evidence of more confused marriage relationships, moreover, is nowhere of such a character as to warrant the conclusion that promiscuity in sexual connections has among any people marked the first or any regular stage of social development. "All the evidence we possess tends

to show that among our earliest human ancestors the family, not the tribe, formed the nucleus of every social group, and, in many cases, was itself perhaps the only social group." "It seems probable, moreover, that monogamy prevailed almost exclusively among our earliest human ancestors."[1] Promiscuity belongs, not to the most primitive times or to the regular order of social life, but rather to exceptional seasons of demoralization or confusion; to times of decadence rather than to the origins of the race. Polyandry has grown up only where the women were fewer than the men, and has almost necessarily broken down when the numerical balance between the sexes was restored. Polygyny "has been less prevalent at the lowest stages of civilization,— where wars do not seriously disturb the proportion of the sexes; where life is chiefly supported by hunting, and female labor is consequently of slight value; where there is no accumulation of wealth and no distinction of class, — than it is at somewhat higher stages."[2] Where it does exist, it is invariably confined to a small minority of wealthy and powerful men; the majority, from choice or necessity, are always monogamous. First and last, the strong monogamous instinct, which man shares with all the higher orders of beasts, has tended to exclude promiscuous or multiplied sexual connections, and to build up a distinct family order round about monogamous marriages.

The efficient races who have dominated the European stage, at any rate, came into their place of leadership and advantage under the discipline of the patriarchal order of family life. Whether with several wives or with only one, the father was chief and master among them, and the family showed that clear authority and close organization which was to serve in fulness of time as the prototype and model for the State.

8. **From the Patriarchal Family to the State.** — Among these Aryan peoples there was first the family ruled by the father as king and priest. There was no majority for the sons so long as their father lived. They might marry and have children, but they could have no entirely separate and independent authority during their father's life save such as he suffered them to exer-

[1] Westermarck, *History of Human Marriage*, pp. 538, 549.

[2] *Id.*, 548.

cise. All that they possessed, their lives even and the lives of those dependent upon them, were at the disposal of this absolute father-sovereign. Such a group naturally broadens in time into the 'House,' or *gens*, and over this too a chief kinsman rules. There are common religious rites and observances which the *gens* regards as symbolic of its unity as a composite family; and heads of houses exercise many high representative and probably some imperative magisterial functions by virtue of their position. Then, as the social order widens, Houses are in their turn absorbed. The first distinctively political unit, no doubt, was the Tribe: broader than the *gens* and tending to subordinate it; a body in which kinship must still have been deemed the bond of union, but in which, nevertheless, it must have been a very obscure bond indeed, and in which family rights must steadily have tended to give way before the establishment of a common order within which the House served only as a unit of membership and a corporation for worship.

Tribes at length united to form a State. In days of nomadic habit the organization of the Tribe sufficed, and no more fixed, definite, or effective order was attempted. But when a people's travelling days were over, a settled life brought new needs of organization: a larger power must have sprung up almost of itself. Then a very significant thing happened. The State in effect ousted both the House and the Tribe from their functions as political units, and came itself to rest, not upon these for foundation, but upon the family, the original formation of the social substructure. Tribe and *gens* served henceforth only as religious corporations or as the convenient units of representation in the action of the State.

9. **Prepossessions to be put away.** — In looking back to the first stages of political development, it is necessary to put away from the mind certain prepossessions which are both proper and legitimate to modern conceptions of government, but which can have found no place in primitive thought on the subject. It is not possible nowadays to understand the early history of institutions without thus first divesting the mind of many conceptions most natural and apparently most necessary to it. The centuries which separate us from the infancy of society separate us also, by the

whole length of the history of human thought, from the ideas into which the fathers of the race were born; and nothing but a most credulous movement of the imagination can enable the student of to-day to throw himself back into those conceptions of social connection and authority in which government took its rise.

10. **The State and the Land.** — How is it possible, for instance, for the modern mind to conceive distinctly a *travelling* political organization, a State without territorial boundaries or the need of them, composed of persons, but associated with no fixed or certain habitat? And yet such were the early tribal states, — nomadic groups, now and again hunting, fishing, or tending their herds by this or that particular river or upon this or that familiar mountain slope or inland seashore, but never regarding themselves or regarded by their neighbors as finally identified with any definite territory. Historians have pointed out the abundant evidences of these facts that are to be found in the history of Europe no further back than the fifth century of our own era. The Franks came pouring into the Roman empire just because they had had no idea theretofore of being confined to any particular Frank-*land*. They left no France behind them at the sources of the Rhine; and their kings quitted those earlier seats of their race, not as kings of France, but as kings of the Franks. There were kings of the Franks when the territory now called Germany, as well as that now known as France, was in the possession of that imperious race: and they became kings of France only when, some centuries later, they had settled down to the unaccustomed habit of confining themselves to a single land. Drawn by the processes of feudalization (secs. 313, 323, 351, 352), sovereignty then found at last a local habitation and a name.

11. The same was true of the other Germanic nations. They also had chiefs who were the chiefs of people, not the chiefs of lands. There were kings of the English for many a year, even for several centuries after A.D. 449, before there was such a thing as a king of England. John was the first officially to assume the latter title. From the first, it is true, social organization has everywhere tended to connect itself more and more intimately with the land from which each social group has drawn its sustenance. When the migratory life was over, especially, and the

settled occupations of agriculture had brought men to a stand upon the land which they were learning to till, political life, like all the other communal activities, came to be associated more and more directly with the land on which each community lived. But such a connection between lordship and land was a slowly developed notion, not a notion twin-born with the notion of government.

12. Modern definitions of a State always limit sovereignty to some definite land. "A State" — runs the modern definition — "is a People organized for law within a definite territory." But the first builders of government would not have found such a definition intelligible. They could not have understood why they might not move their whole people, 'bag and baggage,' to other lands, or why, for the matter of that, they might not keep them moving their tents and possessions unrestingly from place to place in perpetual migration, without in the least disturbing the integrity or even the administration of their infant 'State.' Each organized group of men had other means of knowing their unity than mere neighborhood to one another; other means of distinguishing themselves from similar groups of men than distance or the intervention of mountain or stream. The original governments were knit together by bonds closer than those of geography, more real than the bonds of mere contiguity. They were bound together by real or assumed kinship. They had a corporate existence which they regarded as inhering in their blood and as expressed in all their daily relations with each other. They lived together because of these relations; they were not related because they lived together.

13. **Contract versus Status.** — Scarcely less necessary to modern thought than the idea of territoriality as connected with the existence of a State, is the idea of contract as determining the relations of individuals. And yet this idea, too, must be put away if we would understand primitive society. In that society men were *born* into the station and the part they were to have throughout life, as they still are among the peoples who preserve their earliest conceptions of social order. This is known as the law of *status*. It is not a matter of choice or of voluntary arrangement in what relations men shall stand towards each other as individuals. He

who is born a slave, let him remain a slave; the artisan, an artisan; the priest, a priest, — is the command of the law of *status*. Excellency cannot avail to raise any man above his parentage; aptitude is suffered to operate only within the sphere of each man's birthright. No man may lose 'caste' without losing respectability also and forfeiting the protection of the law. Or, to go back to a less developed society, no son, however gifted, may lawfully break away from the authority of his father, however cruel or incapable that father may be; or make any alliance which will in the least degree draw him away from the family alliance and duty into which he was born. There is no thought of contract. Every man's career is determined for him before his birth. His blood makes his life. To break away from one's birth station, under such a system, is to make breach not only of social, but also of religious duty, and to bring upon oneself the curses of men and gods. Primitive society rested, not upon contract, but upon *status*. *Status* had to be broken through by some conscious or unconscious revolution before so much as the idea of contract could arise; and when that idea did arise, change and variety were assured. Change of the existing social order was the last thing of which the primitive community dreamed; and those races which allowed the rule of *status* to harden about their lives still stand where they stood a thousand years ago. "The leaving of men to have their careers determined by their efficiencies," says Mr. Spencer, "we may call the principle of change in social organization."

14. **Theories concerning the Origin of the State: the Contract Theory.** — Such views of primitive society furnish us with destructive dissolvents of certain theories once of almost universal vogue as to the origin of government. The most famous, and for our present purposes most important, of these theories is that which ascribes the origin of government to a 'social compact' among primitive men.

The most notable names connected with this theory as used to account for the existence of political society are the names of Hooker, Hobbes, Locke, and Rousseau. It is to be found developed in Hooker's *Ecclesiastical Polity*, Hobbes' *Leviathan*, Locke's *Civil Government*, and Rousseau's *The Social Contract*.

This theory begins always with the assumption that there exists, outside of and above the laws of men, a Law of Nature.[1] Hobbes conceived this Law to include "justice," "equity," "modesty," "mercy"; "in sum, 'doing to others as we would be done to.'" All its chief commentators considered it the abstract standard to which human law should conform. Into this Law primitive men were born. It was binding upon their individual consciences; but their consciences were overwhelmed by individual pride, ambition, desire, and passion, which were strong enough to abrogate Nature's Law. That Law, besides, did not bind men *together*. Its dictates, if obeyed, would indeed enable them to live tolerably with one another; but its dictates were not obeyed; and, even if they had been, would have furnished no permanent frame of civil government, inasmuch as they did not sanction magistracies, the setting of some men to be judges of the duty and conduct of other men, but left each conscience to command absolutely the conduct of the individual. In the language of the 'judicious Hooker,' the laws of Nature "do bind men absolutely, even as they are men, although they have never any settled fellowship, never any solemn agreement, amongst themselves what to do or not to do; but forasmuch as we are not by ourselves sufficient to furnish ourselves with competent store of things needful for such a life as our Nature doth desire, a life fit for the dignity of man, therefore to supply these defects and imperfections which are in us living single and solely by ourselves, we are naturally induced to seek communion and fellowship with others. This was the cause of men uniting themselves at first in politic societies."[2] In other words, the belligerent, non-social parts of man's character were originally too strong for this Law of Nature, and the 'state of nature,' in which that Law, and only that Law, offered restraint to the selfish passions, became practically a *state of war*, and consequently intolerable. It was brought to an end in the only way in which such a condition of affairs could be brought to an end without mutual extermination, namely, by common consent, by men's "agreeing together mutually to enter into one community

[1] For the natural history of this conception of a Law of Nature, see Maine, *Ancient Law*, Chap. III. Also *post*, secs. 269–271.

[2] *Ecclesiastical Polity*, Book I., sec. 10.

and make one body politic." (Locke.) This agreement meant submission to some one common authority, which should judge between man and man; the surrender on the part of each man of all rights antagonistic to the rights of others; forbearance and coöperation. Locke confidently affirmed "that all men are naturally in that state [a state, *i.e.*, of nature], and remain so till, by their own consents, they make themselves members of some politic society." It was only as the result of deliberate choice, in the presence of the possible alternative of continuing in this state of nature, that commonwealths came into being.

15. **Traditions of an Original Lawgiver.** — Ancient tradition had another way of accounting for the origin of laws and institutions. The thought of almost every nation of antiquity went back to some single lawgiver at whose hands their government had taken its essential and characteristic form, if not its beginning. There was a Moses in the background of many a history besides that of the Jews. In the East there was Menu; Crete had her Minos; Athens her Solon; Sparta her Lycurgus; Rome her Numa; England her Alfred. These names do not indeed in every instance stand so far back as the beginning of government; but they do carry the mind back in almost every case to the birth of *national* systems, and suggest the overshadowing influence of individual statesmen as the creative power in framing the greater combinations of politics. They bring the conception of conscious choice into the history of institutions. They look upon systems as *made*, rather than as developed.

16. **Theory of the Divine Origin of the State.** — Not altogether unlike these ancient conceptions of lawgivers towering above other men in wisdom and authority, dominating political construction, and possibly inspired by divine suggestion, is that more modern idea which attributes human government to the immediate institution of God himself, — to the direct mandate of the Creator. This theory has taken either the definite form of regarding human rulers as the direct vicegerents of God, or the vague form of regarding government as in some way given to man as part of his original make-up

17. **The Theories and the Facts.** — Modern research into the early history of mankind has made it possible to reconstruct,

in outline, much of the thought and practice of primitive society, and has thus revealed facts which render it impossible for us to accept any of these views as adequately explaining what they seek to explain. The defects of the social compact theory are too plain to need more than brief mention. That theory simply has no historical foundation. The family was the original, and *status* the fixed basis, of primitive society. The individual counted for nothing; society — the family, the tribe — counted for everything. Government came, so to say, before the individual and was coeval with his first human instincts. There was no place for contract; and yet this theory makes contract the first fact of social life. Such a contract as it imagines could not have stood unless supported by that reverence for 'law' which is an altogether modern principle of action. The times in which government originated knew absolutely nothing of law as we conceive it. The only bond was kinship, — the common blood of the community; the only individuality was the individuality of the community as a whole. Man was merged in society. Without kinship there was no duty and no union. It was not by compounding rights, but by assuming kinship, that groups widened into States, — not by contract, but by adoption. Not deliberate and reasoned respect for law, but habitual and instinctive respect for authority, held men together; and authority did not rest upon mutual agreement, but upon mutual subordination.

18. Of the theories of the origination of government in individual lawgiving or in divine dictate, it is sufficient to say that the one exaggerates the part played by human choice, and the other the part played by man's implanted instincts, in the formation and shaping of political society.

19. **The Truth in the Theories.** — Upon each of these theories, nevertheless, there evidently lies the shadow of a truth. Although government did not originate in a deliberate contract, and although no system of law or of social order was ever made 'out of hand' by any one man, government was not all a mere spontaneous growth. Deliberate choice has always played a part in its development. It was not, on the one hand, given to man ready-made by God, nor was it, on the other hand, a human contrivance. In its origin it was spontaneous, natural, twin-born with man and

the family; Aristotle was simply stating a fact when he said, "Man is by nature a political animal." But, once having arisen, government was affected, and profoundly affected, by man's choice; only that choice entered, not to originate, but to modify government.

20. **Conclusion.** — Viewed in the light of "the observed and recorded experience of mankind," "the ground and origin of society is not a compact; that never existed in any known case, and never was a condition of obligation either in primitive or developed societies, either between subjects and sovereign, or between the equal members of a sovereign body. The true ground is the acceptance of conditions which came into existence by the sociability inherent in man, and were developed by man's spontaneous search after convenience. The statement that while the constitution of man is the work of nature, that of the state is the work of art, is as misleading as the opposite statement that governments are not made, but grow. The truth lies between them, in such propositions as that institutions owe their existence and development to deliberate human effort, working in accordance with circumstances naturally fixed both in human character and in the external field of its activity." [1]

21. **The Beginnings of Government.** — Government must have had substantially the same early history amongst all progressive races. It must have begun in clearly defined family discipline. Such discipline would scarcely be possible among races in which consanguinity was subject to profound confusion and in which family organization therefore had no clear basis of authority on which to rest. In every case, it would seem, the origination of what we should deem worthy of the name of government must have awaited the development of some such definite family as that in which the father was known, and known as ruler. Whether or not the patriarchal family was the first form of the family, it must have furnished the first adequate form of government.

22. **The Family the Primal Unit.** — The family was the primal unit of political society, and the seed-bed of all larger growths of government. The individuals that were drawn together to con-

[1] John Morley, *Rousseau*, Vol. II., pp. 183–4.

stitute the earliest communities were not individual men, as Locke and Locke's co-theorists would lead us to believe, but individual families; and the organization of these families, whether singly or in groups, furnished the ideas in which political society took its root. The members of each family were bound together by kinship. The father's authority bore the single sanction of his being the fountain-head of the common blood-relationship. No other bond was known, or was then conceivable, except this single bond of blood-relationship. A man out of this circle of kinship was outside the boundaries of possible friendship, was as of course an alien and an enemy.

23. **Persistence of the Idea of Kinship.** — When society grew, it grew without any change of this idea. Kinship was still, actually or theoretically, its only amalgam. The commonwealth was for long conceived of as being only a larger kindred. When by natural increase a family multiplied its branches and widened into a *gens*, and there was no grandfather, great-grandfather, or other patriarch living to keep it together in actual domestic oneness, it would still not separate. The extinct authority of the actual ancestor could be replaced by the less comprehensive but little less revered authority of some selected elder of the 'House,' the oldest living ascendant, or the most capable. Here would be the materials for a complete body politic held together by the old fibre of actual kinship.

24. **Fictitious Kinship: Adoption.** — Organization upon the basis of a fictitious kinship was hardly less naturally contrived in primitive society. There was the ready, and immemorial, fiction of *adoption*, which to the thought of that time seemed no fiction at all. The adopted man was no less real a member of the family than was he who was natural-born. His admittance to the sacred, the exclusive religious mysteries of the family, at which no stranger was ever suffered even to be present, and his acceptance of the family gods as his own gods, was not less efficacious in making him one with the household and the kin than if he had opened his veins to receive their blood. And so, too, Houses could grow by the adoption of families, through the engrafting of the alien branches into this same sacred stock of the esoteric religion of the kindred. Whether naturally, there-

fore, or artificially, Houses widened into tribes, and tribes into commonwealths, without loss of that kinship in the absence of which, to the thinking of primitive men, there could be no communion, and therefore no community, at all.

25. **Kinship and Religion.** — In this development kinship and religion operated as the two chief formative influences. Religion seems in most instances to have been at first only the expression of kinship. The central and most sacred worship of each group of men, whether family or tribe, was the worship of *ancestors*. At the family or communal altar the worshipper came into the presence of the shades of the great dead of his family or race. To them he did homage; from them he craved protection and guidance. The adopted man, therefore, when received into this hallowed communion with the gods of the family, accepted its fathers as his own, and took upon himself the most solemn duties and acquired the most sacred privileges of kinship. So, too, of the family adopted into the *gens*, or the *gens* received into the tribe. The new group accepted the ancestry by accepting the worship of the adopting House or community.

Religion was thus quite inseparably linked with kinship. It may be said to have been the thought of which kinship was the embodiment. It was the sign and seal of the common blood, the expression of its oneness, its sanctity, its obligations. He who had entered into the bonds of this religion had, therefore, entered into the heart of kinship and taken of its life-blood. His blood-relationship was thus rendered no fiction at all to the thought of that day, but a solemn verity, to which every religious ceremonial bore impressive witness.

26. **The Bonds of Religion and Precedent.** — The results of such a system of life and thought were most momentous. It is commonplace now to remark upon English regard for precedent, and upon the interesting development of 'common' and 'case' law. But not even an Englishman or an American can easily conceive of any such reverential regard for precedent as must have resulted from a canonization of ancestors. We have ourselves in a measure canonized our own forefathers of the revolutionary era, worshipping them around fourth of July altars, to the great benefit both of our patriotism and of our political morality. But the men

of '76, we are all willing to acknowledge, were at their greatest only men. The ancestor of the primitive man became, on the contrary, a god, and a god of undying power. His spirit lived on to bless or to curse. His favor had to be propitiated, his anger appeased. And herein was a terribly effective sanction for precedent. It was no light matter to depart from the practices of these potent ancestors. To do so was to run in the face of the deities. It was to outrage all religious feeling, to break away from all the duties of spiritual kinship. Precedent was under such circumstances imperative. Precedent of course soon aggregated into custom, — such custom as it is now scarcely possible to conceive of, — a supreme, uniform, imperious, infrangible rule of life which brought within its inexorable commands every detail of daily conduct.

27. **The Reign of Custom.** — This reign of customary law was long and decisive. Its tendency was to stiffen social life into a formula. It left almost no room at all for the play of individuality. The family was a despotism, society a routine. There was for each man a rigorous drill of conformity to the custom of his tribe and house. Superstition strengthened every cord and knot of the network of observance which bound men to the practices of their fathers and their neighbors. That tyranny of social convention which men of independent or erratic impulse nowadays find so irksome, — that 'tyranny of one's next-door neighbor' against which there are now and again found men bold enough to rebel, — had its ideal archetype in this rigid uniformity of custom which held ancient society in hard crystallization.

28. **Fixity of System the Rule, Change the Exception.** — Such was the discipline that moulded the infancy of political society: within the family, the supreme will of the father; outside the family, the changeless standards of religious opinion. The tendency, of course, was for custom to become fixed in a crust too solid ever to be broken through. In the majority of cases, moreover, this tendency was fulfilled. Many races have never come out of this tutelage of inexorable custom. Many others have advanced only so far beyond it as those caste systems in which the law of *status* and the supremacy of immemorial custom have worked out their logical result in an unchanging balance of hereditary classes.

The majority of mankind have remained stationary in one or another of the earliest stages of political development, their laws now constituting as it were ancient records out of which the learned may rewrite the early history of those other races whom primitive custom did not stagnate, but whose systems both of government and of thought still retain many traces (illegible without illumination from the facts of modern savage life) of a similar infancy. Stagnation has been the rule, progress the exception. The greater part of the world illustrates in its laws and institutions what the rest of the world has escaped; the rest of the world illustrates what favorable change was capable of making out of the primitive practices with which the greater part of the world has remained *per force* content.

29. **Changes of System outrun Changes of Idea.** — The original likeness of the progressive races to those which have stood still is witnessed by that persistency of idea of which I have already spoken. Progress has brought nations out of the primitive practices vastly more rapidly than it has brought them out of the primitive ideas of political society. Practical reform has now and again attained a speed that has never been possible to thought. Instances of this so abound in the daily history of the most progressive nations of the world of to-day that it ought not to be difficult for us to realize its validity in the world of the first days of society. Our own guilds and unions and orders, merely voluntary and conventional organizations as they are, retain in their still vivid sense of the *brotherhood* of their members at least a reminiscence of the ideas of that early time when kinship was the only conceivable basis of association between man and man, when "each assemblage of men seems to have been conceived as a Family."[1] In England political change has made the great strides of the last two centuries without making the Crown any less the central object of the theoretical or lawyerly conception of the English constitution. Every day witnesses important extensions and even alterations of the law in our courts under the semblance of a simple application of old rules (secs. 258, 1421, 1422). Circumstances alter principles as well as cases, but it is only the cases which are supposed to be altered. The principles remain,

[1] Maine, *Early History of Institutions*, p. 232.

in form, the same. Men still carry their brides on wedding journeys, although the necessity for doing so ceased with the practice, once general, of stealing a bride. 'Good blood' still continues to work wonders, though achievement has come to be the only real patent of nobility in the modern world. In a thousand ways we are more advanced than we *think* we are.

30. **How did Change enter?** — The great question, then, is, How did change enter at all that great nursery of custom in which all nations once wore short clothes, and in which so many nations still occupy themselves with the superstitions and the small play of childhood? How did it come about that some men became progressive, while most did not? This is a question by no means easy to answer, but there are probabilities which may throw some light upon it.

31. **Differences of Custom.** — In the first place, it is not probable that all the groups of men in that early time had the same customs. Custom was doubtless as flexible and malleable in its infancy as it was inflexible and changeless in its old age. In proportion as group separated from group in the restless days of the nomadic life, custom would become differentiated from custom. Then, after first being the cause, isolation would become the natural result of differences of life and belief. A family or tribe which had taken itself apart and built up a practice and opinion all its own would thereby have made itself irrevocably a stranger to its one-time kinsmen of other tribes. When its life did touch their life, it would touch to clash, and not to harmonize or unite. There would be a Trojan war. The Greeks had themselves come, it may be, from these very coasts of Asia Minor; the Trojans were perhaps their forgotten and now alien kinsmen. Greeks, Romans, Celts, had probably once been a single people; but how unlike did they become!

32. **Antagonism between Customs.** — We need not specially spur our imaginations to realize how repugnant, how naturally antagonistic, to each other families or tribes or races would be rendered by differences of custom. "We all know that there is nothing that human beings (especially when in a low state of culture) are so little disposed to tolerate as divergencies of custom," says Mr. Hamerton, who is so sure of the fact that he does

not stop to illustrate it. How 'odd,' if not 'ridiculous,' the ways of life and the forms of belief often seem to us in a foreign country, — how instinctively we pronounce them inferior to our own! The Chinaman manages his rice quite as skilfully with his 'chop-sticks' as we manage ours with our forks; and yet how 'queer,' how 'absurd' chop-sticks are! And so also in the weightier matters of social and religious practice.

33. **Competition of Customs.** — To the view of the primitive man all customs, great or small, were matters of religion. His whole life was an affair of religion. For every detail of conduct he was accountable to his gods and to the religious sentiment of his own people. To tolerate any practices different from those which were sanctioned by the immemorial usage of the tribe was to tolerate impiety. It was a matter of the deepest moment, therefore, with each tribal group to keep itself uncontaminated by alien custom, to stamp such custom out wherever and whenever it could be discovered. That was a time of war, and war meant a competition of customs. The conqueror crushed out the practices of the conquered and compelled them to conform to his own.

34. **The Better prevail.** — Of course in such a competition the better custom would prevail over the worse.[1] The patriarchal family, with its strict discipline of the young men of the tribe, would unquestionably be "the best campaigning family," — would supply the best internal organization for war. Hence, probably, the national aspect of the world to-day: peoples of patriarchal tradition occupying in unquestioned ascendency the choicest districts of the earth; all others thrust out into the heats or colds of the less-favored continents, or crowded into the forgotten corners and valley-closets of the world. So, too, with the more invigorating and sustaining religions. Those tribes which were least intimidated by petty phantoms of superstition, least hampered by the chains of empty but imperative religious ceremonial, by the engrossing observance of times and seasons, having greater confidence in their gods, would have greater confidence in themselves, would be freer to win fortune by their own hands,

[1] For the best development of the whole idea of this paragraph and others in this connection, see Bagehot, *Physics and Politics*, Chap. II.

instead of passively seeking it in the signs of the heavens or in the aspects of nearer nature; and so would be the surer conquerors of the earth. Religion and the family organization were for these early groups of kindred men the two indexes of character. In them was contained inferiority or superiority. The most serviceable customs won the day.

35. **Isolation, Stagnation.** — Absolute isolation for any of these early groups would of course have meant stagnation; just as surely as contact with other groups meant war. The world, accordingly, abounds in stagnated nationalities; for it is full of instances of isolation. The great caste nations are examples. It is, of course, only by a figure of speech that we can speak of vast peoples like those of China and India as isolated, though it is scarcely a figure of speech to say that they are stagnated. Still in a very real sense even these populous nations were isolated. We may say, from what we discern of the movements of the nations from their original seats, that the races of China and India were the 'back-water' from the great streams of migration. Those great streams turned towards Europe and left these outlying waters to subside at their leisure. In subsiding there was no little commotion amongst them. There were doubtless as many intertribal wars in the early history of China before the amalgamation of the vast kingdom as there have been in the history of India. That same competition of custom with custom which took place elsewhere, also took place there. But the tribes which pressed into China were probably from the first much of a kind, with differing but not too widely contrasted customs, which made it possible for them to assume at a now very remote period a uniformity of religion and of social organization never known amongst the peoples that had gone to the West; so that, before the history that the rest of the world remembers had begun, China's wall had shut her in to a safe stagnation of monotonous uniformity. The great Indian castes were similarly set apart in their vast peninsula by the gigantic mountains which piled themselves between them and the rest of the continent. The later conquests which China and India suffered at the hands of Oriental invaders resulted in mere overlordships, which changed the destination of taxes, but did not touch the forms of local custom.

36. **Movement and Change in the West.** — It is easy to imagine a rapid death-rate, or at least an incessant transformation, amongst the customs of those races which migrated and competed in the West. There was not only the contact with each other which precipitated war and settled the question of predominance between custom and custom; there was also the slow but potent leaven of shifting scene and changing circumstance. The movement of the peoples was not the march of a host. It was only the slow progress of advancing races, its stages often centuries long, its delays fruitful of new habits and new aspirations. We have, doubtless, a type of what took place in those early days in the transformation of the Greeks after they had come down to the sea from the interior of Asia Minor. We can dimly see them beginning a new life there on those fertile coasts. Slowly they acquired familiarity with their new neighbor, the sea. They learned its moods. They imagined new gods breathing in its mild or storming in its tempestuous winds. They at length trusted themselves to its mercy in boats. The handling of boats made them sailors; and, lured from island to island across that inviting sea, they reached those later homes of their race with which their name was to be forever afterwards associated. And they reached this new country changed men, their hearts strengthened for bolder adventure, their hands quick with a readier skill, their minds open to greater enthusiasms and enriched with warmer imaginings, their whole nature profoundly affected by contact with Father Ægeus.

37. **Migration and Conquest.** — And so, to a greater or less extent, it must have been with other races in their movements toward their final seats. Not only the changes of circumstance and the exigencies of new conditions of life, but also the conquests necessarily incident to those days of migration, must have worked great, though slow, alterations in national character. We know the Latins to have been of the same stock with the Greeks; but by the time the Latins had reached Italy they were already radically different in habit, belief, and capacity from the Greeks, who had, by other routes, reached and settled Magna Græcia. Conquest changes not only the conquered, but also the conquerors. Insensibly, it may be, but deeply, they are affected

by the character of the subdued or absorbed races. Norman does not merge with Saxon without getting Saxon blood into his own veins, and Saxon thoughts into his own head; neither had Saxon overcome Celt without being himself more or less taken captive by Celtic superstition. And these are but historical instances of what must have been more or less characteristic of similar events in 'prehistoric' times.

38. **Intertribal Imitation.** — There must, too, have been among the less successful or only partially successful races a powerful tendency towards *imitation* constantly at work, — imitation of the institutions of their more successful neighbors and rivals. Just as we see, in the histories of the Old Testament, frequent instances of peoples defeated by Jewish arms incontinently forsaking their own divinities and humbly commending themselves to the God of Israel, so must many another race, defeated or foiled in unrecorded wars, have forced themselves to learn the customs in order that they might equal the success of rival races.

39. **Individual Initiative and Imitation.** — And this impulse towards imitation, powerful as between group and group, would of course, in times of movement and conquest, be even more potent amongst individual men. Such times would be rich with opportunity for those who had energy and enterprise. Many a great career could be carved out of the events of days of steady achievement. Men would, as pioneers in a new country or as leaders in war, be more or less freed from the narrow restrictions of hard and fast custom. They could be unconventional. Their individual gifts could have play. Each success would not only establish their right to be themselves, but would also raise up after them hosts of imitators. New types would find acceptance in the national life; and so a new leaven would be introduced. Individual initiative would at last be permitted a voice, even as against immemorial custom.

40. **Institutional Changes: Choice of Rulers.** — It is easy to see how, under the bracing influences of race competition, such forces of change would operate to initiate and hasten a progress towards the perfecting of institutions and the final abolition of slavery to habit. And it is no less plain to see how such forces of change would affect the constitution of government. It is evident that,

as has been said (sec. 34), the patriarchal family did furnish the best campaigning materials, and that those races whose primitive organization was of this type did rapidly come to possess the "most-competed-for" parts of the earth. They did come to be the chief, the central races of history. But race aggregations, through conquest or adoption, must have worked considerable changes in the political bearings of the patriarchal principle. The direct line of male descent from the reputed common progenitor of the race could hardly continue indefinitely to be observed in filling the chieftainship of the race. A distinct element of choice — of election — must have crept in at a very early period. The individual initiative of which I have spoken, contributed very powerfully to effect this change. The oldest male of the hitherto reigning family was no longer chosen as of course, but the wisest or the bravest. It was even open to the national choice to go upon occasion altogether outside this succession and choose a leader of force and resource from some other family.

41. **Hereditary replaced by Political Magistracy.** — Of course mere growth had much to do with these transformations. As tribes grew into nations, by all the processes of natural and artificial increase, all distinctness of mutual blood-relationship faded away. Direct common lines of descent became hopelessly obscured. Cross-kinships fell into inextricable confusion. Family government and race government became necessarily divorced, — differentiated. The state continued to be conceived as a Family; but the headship of this huge and complex family ceased to be natural and became *political*. So soon as hereditary title was broken in upon, the family no longer dominated the state; the state at last dominated the family. It often fell out that a son, absolutely subject to his father in the family, was by election made master of his father outside the family, in the state. Political had at least begun to grow away from domestic authority.

42. **Summary.** — It will be possible to set forth the nature of these changes more distinctly when discussing Greek and Roman institutions at length in the next chapters. Enough has been said here to make plain the approaches to those systems of government with which we are familiar in the modern world. We can understand how custom crystallized about the primitive man;

how in the case of the majority of mankind it preserved itself against all essential change; how with the favored minority of the race it was broken by war, altered by imperative circumstance, modified by imitation, and infringed by individual initiative; how change resulted in progress; and how, at last, kinsmen became fellow-citizens.

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II.

THE GOVERNMENTS OF GREECE.

43. **The Evolution of Government.** — At no one of the various stages of their development may we photograph the ancient classical governments and say that we have an adequate picture of Greek or Roman political practice. We cannot speak of the governments of Greece and Rome instructively except as evolutions. Their history is of course never complete at any one period. Moreover, each stage of their development illuminates the processes which we have just been discussing, the processes by which the primitive constructions of government were modified and modern systems of government approached. We may study modern governments as they are; but in order to understand modern governments as they are it is necessary to know ancient and mediæval governments in their chief successive periods of development.

44. **The Patriarchal Presidencies: Legislation.** — We get our earliest glimpse of Greek governments from Homer. When the Iliad and Odyssey were written, monarchy was universal throughout the Greek world. But not such monarchy as grew up in the later times of classical political development with which we are more familiar. It was monarchy of a kind which no longer exists. It would be more in keeping with the modern meaning of words to describe it as a *Patriarchal Presidency*. The kings of Homer's songs were not often supreme rulers who gave law and singly administered justice to their subjects. They were chief nobles, rather, 'the first among equals,' presidents of councils of peers. The early monarchies of Greece were not constituted of single cities, like the later republics, but probably of groups of communities acknowledging a common government. The centre

of that government was the council of Elders (*Gerontes*), heads of the noble families. That council was the 'king's council' only because it convened at the king's summons. He called his peers to a feast. To speak modernly, the dinner-table was the council-board. State affairs were discussed over the wine and the viands, after a manner which suggests to the reader of to-day Friedrich Wilhelm's "Tobacco Parliament," where imperial business shaped itself as it might through the laconic speech of king and councillors uttered amidst the smoke of fuming pipes. Here the purposes and plans of government originated. Prussian plans, however, were seldom formally announced, while Greek plans were almost always made publicly known. The king summoned an assembly of the people (an assembly, that is, of the *gentes*, the members of the recognized immemorial kinship) to hear the decrees of the elders. The presidency of this assembly, like the presidency of the council, belonged to the king; or, rather, the council itself, as it were, presided, under the headship of the king. The elders sat before the assembled tribesmen about the person of the king. The king announced the business to be considered, and the elders, if they chose, addressed the people concerning it. No vote was taken. The assembly freely made known its sentiments concerning the utterances of the noble orators by noisy demonstrations of agreement or by a cold silence of disagreement; and on critical occasions its feelings no doubt counted for something; it had no choice, however, but to acquiesce in the decisions of the council, previously fixed upon at dinner.

45. **Tribal Justice.** — Such was ancient Greek legislation. Judicial proceedings were not radically different. In some instances, doubtless, the king dispensed justice as sole magistrate. He was generally the richest, as well as officially the first, of the noblemen of the kingdom, and as such must have adjudged many differences between his numerous personal retainers, even if he did not often act as sole judge between other litigants. But most cases arising between men of different family groups were heard by the king and his council in the presence of the people, much as public business was considered, each councillor being entitled to deliver an opinion in his turn, and a majority of voices probably controlling.

46. **Patriarch and Priest.** — I have called this presidency of the king in state affairs a 'patriarchal' presidency because it belonged to him by hereditary right, as chief elder by direct descent from the first preferred elder of his people. The family once chosen by the gods to preside in council and command in war was not often set aside; and the usual succession by primogeniture was seldom departed from. This president-king, besides, had other prerogatives typical of a patriarchal headship. He was the high priest of his people, performing all those sacrifices and leading in all those ceremonials which spoke the family oneness of the nation. He was the representative of the nation in its relations with the gods. He was also commander-in-chief in war, here again representing the unity of the people over whom he presided.

47. **Not Lord, but Chief.** — But here the kingly prerogatives ended. These presidential and representative functions of the early Greek king contained the sum of his powers. Aside from his presidency in legislation and in adjudication, his high-priesthood, and his command in war, he had little power. There was no distinct idea as yet of personal allegiance to the monarch on the part of the people at large. He received gifts from the people and had the usufruct of the public domain for his support; but these were accorded him rather as father and typical head of his nation than as master. The services rendered him were largely voluntary. He was not lord, but chief of his people.

48. **The Primitive Δῆμος.** — In one sense the king was not chief of a *people* at all. The Homeric δῆμος (dēmos) was not a 'people' in the modern sense of the term. It was not an association of individuals, but an association of *families*, of families which had widened into *gentes*, but which lived apart from each other in semi-independent groups, each possibly clustering about its own village and living its own separate cantonal life. The king was the head of these confederated 'houses,' and the seat of his authority was that 'city' about which their confederate life centred.

49. **The Antique 'City.'** — This city was as unlike as possible to those centres of population and industry which are the cities of our own time. It was very different even from those Greek

cities of historical times of which Athens may be taken as a type, and which were the actual homes of the ruling numbers of the population. The city of Homer's day doubtless contained the dwellings of the king and his assistant priests, but not many besides king and priests, with their families and attendants, lived in it. It was generally a citadel upon a hill to which the confederated families living in the country round about it resorted in times of actual or threatened invasion. It contained the temples of the gods and was the seat of the common worship. In it was the market place, also, in which the trade of the country-side centred. It saw the festivals, the sacrifices, the councils, the courts, the armed musterings of the people. But it did not see their daily life. That was not lived in common, but apart in clans. Each 'house' was a complete independent organism in itself, with a very vital corporate existence. It "had its assemblies; it passed laws which its members were bound to obey, and which the city itself respected."[1] These assemblies were presided over by an hereditary chief who was priest, judge, and military commander of his house — its king, a chief among the heads of its branches. Throughout the *gens* there was the closest brotherhood. It had its common family worship, its religious festivals, its common burying place. Its members could inherit from each other, and were ultimately responsible for each other's conduct and debts. They could not accuse one another before any tribunal but that of their own kindred. They stood together as one family under a complete family government.

50. **Confederate Growth of Family Groups.** — The monarchical city had not originated directly from a confederation of families. It had been developed through a series of other combinations, which, in their religious functions at least, continued to exist after the city had come into being. *Gentes* had first of all united, for the celebration of some common worship, into *Phratries*. *Phratries* had combined, from like motives, into Tribes. It was by a coming together of Tribes that the city had been formed. Each *Phratry* and Tribe had realized the family idea by the worship of the same gods, and the canonization of some common hero as their eponymous ancestor; and each had elevated a chief to its presi-

[1] Coulanges, *The Ancient City*, p. 137 (Am. ed.).

dency and high-priesthood. Each had its assemblies and its festivals.

51. **The 'City' a Confederacy of Gentes.** — But though the city was the next step of confederation after the tribe, it was not tribes, nor yet *phratries,* but *gentes* which were represented in the council of the king. There had been, so to say, a subsidence of political organization upon this older foundation of the family. In the city the tribe continued to be a unit of worship, the *phratry* a unit of worship and of military organization; but only the *gens* was a unit of civil organization. The army was grouped by *phratries,* but government was constituted by families.

52. "The city was not an assemblage of individuals; it was a confederation of several groups, which were established before it, and which it permitted to remain. We see, in the Athenian orators, that every Athenian formed a portion of four distinct societies at the same time; he was a member of a family, of a *phratry*, of a tribe, and of a city. He did not enter at the same time and the same day into all these four," like an American, who at the moment of his birth belongs at once to a family, a county, a state, and a nation. "The *phratry* and the tribe are not administrative divisions. A man enters at different times into these four societies, and ascends, so to speak, from one to the other. First, the child is admitted into the family by the religious ceremony, which takes place six days after his birth. Some years later he enters the *phratry* by a new ceremony. . . . Finally, at the age of sixteen or eighteen, he is presented for admission into the city. On that day, in the presence of an altar, and before the smoking flesh of a victim, he pronounces an oath, by which he binds himself, among other things, always to respect the religion of the city. From that day he is initiated into the public worship, and becomes a citizen. If we observe this young Athenian rising, step by step, from worship to worship, we have a symbol of the degrees through which human association has passed. The course which this young man is constrained to follow is that which society first followed."[1]

53. **Religion: the Priesthood.** — The key to the whole composition of this early society was its religion. The functions of father, chief, and king; the constitutions of family, *phratry,* tribe, and city, — all hung upon certain deep-lying religious conceptions. The father was first of all high priest of his house, the chief first of all high priest of his *phratry,* the king first of all high priest of his city. Their other functions rather flowed from the author-

[1] Coulanges, *The Ancient City*, pp. 169, 170.

ity of their priesthood than were added to it. Religion was the one conclusive motive and sanction of all social order in that early time, as it continued to be for many centuries afterwards; and the heads of religion were of course the rulers of society.

54. It was the leading peculiarity of the religion of that time that each father, chief, and king represented gods whom no one else represented. The gods of one family were never the gods of another family, the gods of one *phratry* or city, never those of another *phratry* or city. Gods were in that day private, not common, property, and were owned inalienably. Each high priest of the series, therefore, had a peculiarly sacred and distinctive character within the group over whose worship he presided, and in that character were contained the seeds of all his other prerogatives. He was chief of the religion of his group; and that religion was the supreme rule of its life. The sacred priesthood of the father could be transmitted only by natural succession. Priests could not be made, unless, in the providence of the gods, they were not born. Then human choice must be resorted to; but that choice must keep itself as close to the direct line of the priestly stock as possible. It must select within the chosen family.

55. **Primogeniture.** — It is because of the rule of such conceptions of civil magistracy, as an authority resulting from the priestly functions of the head of each social group, that we find primogeniture the ruling order of succession alike to eldership, to chieftainship, and to kingship; and it is because of this same rule of religious thought in social organization that we find every magistrate, even those of the later times when magistrates were elected, exercising some priestly function, as if to supply a necessary sanction for his civil powers. The magistrate was always next to the gods, was always their interpreter and servant.

56. **The City's Religion.** — In every way the political life of the city spoke of religion. There was a city hearth in the *prytaneum* on which a fire, sacred to the city's gods, was kept ceaselessly burning; there were public repasts at which, if not the whole people, at least representatives daily sat down to break the sacred cake and pour out the consecrated wine to the gods; the council-feast to which the king invited the Elders (sec. 44),

though also a social feast, was itself first of all a sacred, sacrificial repast over which the king presided by virtue of his priestly office. There were festivals at stated times in honor of the several deities of the city; and the Council always convened in a temple. Politics was a religion.

57. **Decay of the Antique City.** — Such seems to have been the universal first model of completed political society in the Greek world. When it comes within our view in the Homeric songs, however, it is already old and near its end. It was the complete and singularly logical result of that widening from family to tribe which had filled the ages of human life which had gone before it. It was the true offspring of its long ancestry: a greater family descended from a long line of families. But when we catch our first glimpse of it, the end of the pure family state is at hand. A series of revolutions is about to change the whole organization of political society.

58. This change did not proceed everywhere with uniformity. Similar changes were effected, indeed, everywhere; but differing circumstances gave to change a different speed and a varying form and sequence in separated localities. It was not so much a continued development as a differentiation. It will be best, therefore, to continue our examination of the further modification and expansion of Greek institutions by studies of the histories of the particular cities of Greece; and it is almost unavoidable that the particular cities chosen for this purpose should be Athens and Sparta, inasmuch as it is only of these two masterful cities that we have anything like adequate knowledge.

59. **The City absorbs its Constituent Parts.** — There is, however, one uniform process first to be noted amongst all the governments of historical Greece. City life continued everywhere; but the government did not remain cantonal. It became municipal. A 'city' was no longer merely the confederate centre of separated family cantons in which the real life of the people still dwelt. That life had become much more largely and truly a united life. The city no longer received its vitality from the family governments round about it; they, rather, derived their significance from their connection with the city. The city was now, instead of a mere compound or aggregate, a whole, of which tribes, *phra-*

tries, and families were parts. The confederation had, so to say, swallowed up the confederates. The city, a child of family government, had subordinated family government to itself; had usurped a full supremacy, making its parents its subjects.

60. **Decline of the Elders' Separate Powers.** — We have not the historical materials for making quite plain the causes of this notable transformation in political order; but we can see some of the forces which may have brought it about. By coming together under the early city organization the aforetime sovereign family governments necessarily lost much of their importance. Confederation inevitably lessens the individual importance of the confederates. They have no longer their accustomed separate prominence; that has been swallowed up in their aggregate weight. However small might have been the power of each family group when it was dissociated from its neighbors, its independence gave it a dignity, a cohesiveness, an individuality, and a self-sufficiency of which close association with others robbed it. After the independence of the family had been curtailed by confederation, the strongest motives for preserving family organization intact would be displaced by wider interests. The generation which saw the 'city' formed would of course not dream that family importance had been in any wise impaired. The Elders of the first councils would abate not a jot of their pride of blood and of authority, but would deem themselves as great kings as ever. And in those times of reluctantly changing thought scarcely an element of altered conception in regard to these matters would enter for generations together. But, whether sensibly or insensibly, profound modifications both of social thought and of social practice would at length take place. Relegated to a subordinate rank in the political order and no longer obliged to preserve that constitution which had been essential to it while it continued itself an independent government, the *gens* would by degrees lose its close integration and compact organic structure. A kingdom within a kingdom is a difficult thing to keep alive. Its members are confused by a service of two masters, and end by really serving only one, — and that the stronger.

61. **Politieal Disintegration of the Gens.** — The family died, therefore, as a political organization, for lack, no doubt, of suffi-

ciently important functions to keep it interested in itself. It was gradually disintegrated. In religion, indeed, it steadily kept its unity for centuries, formally at least, if not vitally; but in other things it fell slowly apart. Its branches became by degrees more and more independent of each other. Its property was no longer held in common, but was divided with greater and greater freedom, and with less and less regard for that law of primogeniture which had formerly made the eldest-born son of the direct line the sole proprietor, as trustee for his kinsmen, of the family lands and goods. In the end, this eldest son got not even the largest share of the property, but divided it equally with his brothers.

Hellas.

62. **Greece not Hellas.** — In our modern thought of the Greeks we are too apt to make Athens and Sparta the centres and epitome of the whole life of a various nation throughout a long age; forgetting that great Hellenic cities lay far and wide upon almost every Mediterranean shore; that there had been a great civilization in Greece, at whose antiquity we can only guess, long before Athens and Sparta were founded; that the Greeks called themselves *Hellenes*, rather, and thought of themselves as inhabitants, not of narrow Greece only, but of wide *Hellas*, of all the spreading coasts that held the scattered settlements of their race. Wherever Greeks established themselves in independence, setting up their own civilization and characteristic forms of government, there was a piece of Hellas; wherever there was an Hellenic people, there was a portion of the Hellenic land. Neither on the mainland of Greece, nor upon the islands of the Ægean, nor upon the coasts of Asia, nor in Sicily or Italy or Africa, had the Hellenes drawn together under any common political organization; nowhere had their race known any national unity. Hellas named a region, not a nation.

63. **The Migration of the Greek Peoples.** — The Greeks called themselves Hellenes because they traced the lineage of their race to Hellen, prince of the Thessalians, who had led the first great movement of the men of their kin to their modern seats of power. It was he who had led his people, a great host, into the north-

eastern region of classical Greece, to make it 'Thessaly,' driving the Æolians already settled there into new homes further south, in Bœotia. In like manner the Dorians had made their conquering movement southward into Peloponnesus, displacing there the Æolian Achæans, who, thus ousted, in their turn expelled an Ionian population from the narrow, sheltered, southern strip of the Corinthian Gulf coast to which they were to give its historical name — Achaia. Many of the Ionians, thus expelled from their early seats in Peloponnesus, passed northward to join kinsmen in Attica. Thus was that distribution of peoples effected in Greece which was to characterize the classical period of Greek history.

64. But these were not the first movements of Greek history. They stand out bolder to our view, run clearer in the old tradition of the race, usher in the history of which we have some authentic record; but they only changed the old face of affairs in the little world that lay about the Ægean. Greece was full of barbarous tribes, settled up and down all her varied coasts, and within all the pocketed valleys that lay snug among her mountains, long ere these disturbing conquerors came out of the north; and not of barbarous tribes only, but of stately cities here and there, where were to be seen the ancient monuments of a great civilization come out of the East. The Phœnicians had, time out of mind, traded upon these coasts. They had unwittingly taught these Ægean tribesmen to follow the sea, and seek a commerce of their own. There were native seamen on the Ægean, we know, as early as the thirteenth century before Christ. They made bold rivals, it turned out, appropriating first the trade of their own seas, and then pushing out, age by age, into the broad Mediterranean itself, to meet and compete with the seamen of Phœnicia in their oldest haunts and most familiar havens.

65. Upon the western coast of Asia Minor also, and on all the islands that fringed the Ægean upon either hand, or shut it in from the broader seas to the southward, there lay, in those earliest days, a population like this of Greece. Whether these primitive peoples whom the Phœnicians had found were of their own Grecian kin or not, the men of the later age who called themselves Hellenes, could not clearly tell. There were several strains of differing blood, no doubt, among the several peoples of that time.

Some seemed like the Greeks, and mingled with them as kinsmen; others showed an alien cast, as if of an aboriginal people who must have known the land before ever the Greek came. It may be that the migrations of Hellen and his Thessalians, of the Dorians, and of all the peoples they sent afield, were but repetitions of what had taken place more than once before, to be quite forgotten. Possibly earlier Greek migrations, conquests, and settlements had filled the Ægean upon either coast with a people like those of the historic time. The Trojans may, after all, have been elder kinsmen of the men who fought in the hosts of Agamemnon.

66. **The Phœnician Influence.** — The Ægean peoples did not forget what the Phœnicians had taught them; and the Hellenes reaped the harvest, building their civilization upon the foundations already laid in the earlier time. The Phœnicians were already old when the peoples of the northern Mediterranean coasts were yet in their first youth. They had been traders ever since the sixteenth century before Christ; were elders among the nations of their time. It was of course inevitable that the unformed Greeks should learn from them as from masters. And they learned much. They probably learned from these first lords of the Mediterranean not only navigation and shipbuilding, but also the use of weights and measures, their alphabet, and much antique taste and knowledge in the fields of art and science. This eastern culture became at length an integral part of Hellenic thought and habit, hardly to be distinguished as of foreign origin, so completely did they appropriate it, so greatly did they enrich and perfect it by their own genius.

67. **The Known Settlement of the Ægean.** — The movements set afoot by Dorian and Thessalian conquests did not stop with readjustments of population upon the Grecian peninsula. Attica could not easily contain the Ionian immigration which came to her from the southern coasts of the Corinthian Gulf when the Achæans thrust themselves in there to escape the Dorian conquerors. Many, therefore, passed on from Attica across the sea, to found Ionian settlements upon the central Ægean coasts of Asia Minor. Yet earlier, bodies of Achæans, still under the impulse, perhaps, which they had received from the Dorians, had gone from Achaia to occupy the northwest regions of the same Asiatic coast. Even

the Dorians passed on into Asia from Peloponnesus, taking possession of the southwestern coasts of Asia Minor, and establishing themselves in the islands of Crete, Cos, and Rhodes. The Dorians, indeed, had become supreme only in the southern and eastern portions of the Peloponnesus, only in Messenia, Laconia, and Argolis. The settlements in the southern islands of the Ægean archipelago and on the southwestern coasts of Asia Minor symmetrically completed their geographical position as a sort of southern fringe to classical Hellas.

It is, possibly, to this period of the resettlement of Asia Minor by the European Greeks, thus returning, it may be, upon the original lines of Greek movement, that we owe the legend of the Trojan war.

68. **The Greek Mediterranean.** — Nor was even this the last of movement and new settlement. The Greeks were yet to add to a Greek Ægean a Greek Mediterranean. This they effected by means of the notable colonization of the eighth and seventh centuries before Christ. Foremost among the colonizers stood Ionian Miletus, in Asia Minor, and Ionian Chalcis, in Eubœa. Miletus became the mother of more than eighty colonies, sending companies of her people to found Naucratis on the Nile delta, Cyzicus and Sinope, and a score or two of other towns, on the Propontis; making settlements further away still, where she did so much of her trading, on the shores of the Euxine. Chalcis contributed thriving Greek communities to Sicily, created the 'Chalcidici,' and founded Rhegium in Italy. Others were scarcely less busy in colonization. Dorians created the notable city of Tarentum, in Southern Italy; Achæans built upon the same coast the rival cities of Sybaris and Croton; Corinthians established Corcyra off the coast of Epirus, and lusty Syracuse in Sicily. The Ionian Phocæans ventured still further west and built that Massilia which was to become French Marseilles. Massilia, in her turn, sent colonists to the eastern coasts of Spain; and these were kept back only by the power of Carthage from spreading wider still Greek settlement and dominion in the west. In brief, it was a distinguishing characteristic of the whole process by which the Mediterranean was at this time so largely Hellenized that towns begat towns in prolific generation. Each colony was sure to be-

come itself a mother city. The process was of two centuries' duration, extending from about 750 B.C. to about 550 B.C. But so rapidly did it move, so much faster did the colonies develop in all respects than the mother cities of the central Greek lands, that in the first century after the beginning of the Olympiad reckoning (776–676 B.C.) the "centre of gravity of the Hellenic world" had already shifted from Greece proper to the lusty colonial states. In Cicero's phrase, an Hellenic hem was woven about the barbarian lands of the Mediterranean. From far eastern Naucratis, on the Nile, to far western Massilia, in Gaul, throughout almost all the chief islands of the sea, skirting the shores of Propontis and Euxine, as well as on every Mediterranean coast not dominated by Phœnicians, thronged busy Hellenic colonies, impressing everywhere upon the life of that early time their characteristic touch of energy, of ordered government, of bold and penetrating thought and courageous adventure, and everywhere keeping themselves separate, in proud distinctness, from the barbarian peoples round about them.

69. **Race Distribution.** — The distribution thus effected of the various branches of the Greek race is not without its historical interest. The Ægean is circled, east, north, west, and south, by Ionian settlements, only Thessaly and the Æolian colonies on the northwestern coast of Asia Minor breaking their continuity from Eubœa round by the Chalcidici and Thrace, down the eastern coast of the Ægean, through the islands of Samos, Icaria, Naxos, Paros, Tenos, and Andros, to Eubœa again. South of this Ionian circle is the Dorian semicircle, which runs through Crete, Carpathus, and Rhodes to the islands and coasts of Southwestern Asia Minor. Italy is occupied, for the most part, by Æolian settlers, though a Dorian city stands at one end, an Ionian city at the other, of the line of Æolian colonies there. Sicily is shared by Dorians and Ionians.

Everywhere, however close they may live to each other, these several tribes retain their distinctness, conscious of kinship and using substantially the same speech, but persisting in noticeable differences of character and rivalries of aim.

70. **The Greek Colonial System.** — There was little or no political unity even among cities of the same division of the race. No common system of government bound the towns of any coast together; everywhere, on the contrary, they stood aloof from each other, organically separate and self-directive. Greek coloni-

zation was radically different from the colonization which the modern world has seen, and even from that which the Roman world saw. A mother city seldom kept any hold upon her colonies whatever, except a very vague hold of religious sentiment which even very slight strains of adverse circumstance often sufficed to destroy. Colonies went out to become cities, in the full antique sense of that term, completely independent, self-governing communities.

The mother city sent out each colonizing company that left her as if she were sending out a part of herself. The emigrants took with them fire kindled at the public hearth (*prytaneum*), wherewith to furnish their own altars with the sacred flame kept alive from of old in the religious rites of their kinsmen. The mother city supplied them with a leader whom the colonists recognized as their founder; the approval of the Delphic oracle was often sought by the emigrants; and they generally awaited, too, the consent of the city's gods. If, moreover, in after times, a colony contemplated sending out from its own midst another colony, it commonly sought a leader and founder at the hands of its own mother. Many ties of sentiment and tradition bound it to the community from which it had sprung. But it none the less became, immediately upon its birth, a sovereignly separate state, no less its own mistress in all things than the city from which it had come out. The Mediterranean was fringed, not by a few Grecian states, aggregates of Æolian, Dorian, or Ionian settlements, but by scores of separate city communities as independent, for the most part, and often as proud, as Athens, — for a long age as powerful also as she.

71. **Colonial Constitutions.** — It was natural that each colony should retain in its political arrangements the main features of the constitution of its mother city; and in the earlier periods of colonization the Greek world may be said not to have known any political organization but the aristocratic. The earliest periods of colonization, it is true, were the periods of monarchy; but of monarchy already in decay. An aristocratic organization was, accordingly, at first, almost everywhere either produced or reproduced in the colonies. But it was destined from the nature of the case to undergo in these newer communities much more

rapid changes than overtook it in the states of the older Hellenic lands. The men who founded the colonies of the eighth and seventh centuries had most of them left the mother city to be rid of the tyranny of an oligarchical minority and find a free life. Among colonists settling in regions as yet untouched by their own civilization there necessarily obtained an equality of condition, and presently an absence of clear traditional authority, which made democracy grow as if it were a natural product of the soil, and of the new atmospheric conditions. Neither did Tradition bind: everything was to be attempted. Accordingly democracy was developed in the outlying parts very much sooner than in the central lands of Hellas. Athens waited till the end of the sixth century B.C. to see it in the reforms of Clisthenes (secs. 141–151); but many of the newer states had witnessed its introduction quite a century earlier.

72. Although they outran the mother cities of Central Greece, however, in their haste of constitutional change, the colonial cities generally went through just the same phases and stages of revolution that were afterwards to characterize the slower history of Athens. Democracy was generally approached through Timocracy, through arrangements, that is, such as Solon introduced in Athens, by which political privilege was graded according to wealth (secs. 128, 129). Often, too, changes of this nature were accompanied in the colonies, as in Rome (XII. Tables) and in many of the central Greek communities, by a codification and publication of the law. Commonly democracies gave place to tyrannies, which were often, like that of Pisistratus in Athens (sec. 138), erected as a bulwark against aristocratic reaction. Either some man of the people pushed himself forward, by fair means or by foul, and checked aristocratic domination by reducing all alike to submission to his own power; or it was a member of the aristocratic class who made use of a favoring opportunity to destroy aristocracy by a concentration of authority in himself; or else a constitutional king threw aside the restraints of law and ruled as he willed. In almost every case the tyranny answered a useful purpose. It generally compacted and facilitated resistance to outside aggressions upon the independence of the city; it usually advanced, by the maintenance of steadied civil order, the

material interests of the community; it not infrequently bridged safely over the gulf which separated aristocratic privilege from popular sovereignty, preparing the levels of *status* upon which alone democracy could be firmly built.

73. **Law of Constitutional Modification in Hellas.** — We have, thus, the same forces of constitutional change everywhere operative in the Greek world; everywhere substantially the same changes take place in substantially the same order. Monarchy in all cases gives place to aristocracy; aristocracy very often shades off into timocracy; all exclusive privileges in the long run give way before the forces of democracy; but democracy is seldom secured in its final triumph without the intervention of the tyrant, the man who rules without the warrant of the law. In some of the greater Hellenic cities the period of tyranny is the period of highest power and prosperity, and democracy comes afterwards only to mark decline and loss of separate independence. Many Peloponnesian communities cling as long almost as Sparta herself to their aristocratic constitutions: in them class privilege dies exceeding hard. There is by no means a perfect uniformity in Hellas either in the speed or in the character of political change; but everywhere, unless outside circumstance commands otherwise, the same tendencies, the same leaven of plebeian discontent, the same ferment of personal ambition, are operative to work out within each little, self-centred city similar modifications of organization and authority.

74. **Union and Nationality among the Greeks.** — Despite the separateness of Greek city life and its jealous negation of all political power save only that of the citizens of each community acting independently and for themselves, there was a distinct consciousness in the minds of all Greeks alike of a common Hellenic blood, common traditions, a common religion and civilization. A sense of nationality which, though vague, was nevertheless persistent and on occasion decisive of great issues, pervaded the Hellenic cities of the ancient Mediterranean world and gave to the history of the Greeks some features of homogeneity and concert. A common Hellenic character everywhere distinguished Greek communities from all others. But their inbred political habit and their wide geographical extension effectually barred, sooner or later, every movement towards national governmental union.

75. **Religious Community: the Delphic Amphictyony.** — In religion more than in anything else the Greeks made show of union

and gave evidence of a spirit of nationality. In many quarters of Hellas cities lying round about some famous shrine of Zeus, Apollo, Poseidon, or other national deity, came together into an Amphictyony, or League of Neighbors, for the purpose of worthily maintaining and enriching the worship of the divinity and of defending his shrines against pollution or dishonor. The most famous and influential of these associations was that which gathered about the shrine of Demeter Amphictyonis at Thermopylæ and the temple of Apollo at Delphi. It included, at one time or another, almost every tribe, great or small, of Central Greece; and in its later development admitted to membership Dorian states also of Peloponnesus. Its history runs back beyond the beginnings of authentic tradition; but it is probable that it had at one time considerable political influence. Its primary purpose was to superintend the common worship of Apollo, to guard the oracle at Delphi in its sacred independence, to maintain against invasion the territory round about the shrine which was consecrated to the uses of religion. It had regular assemblies composed of delegates from the several states in the league, a permanent official organization, fixed rules of procedure, and ancient prestige.

At the semi-annual meetings of the league, held spring and autumn at Thermopylæ and at Delphi, vast concourses of Greeks swarmed from all parts of the central states of Hellas to take part in the festivals held in honor of the god, and to get gain out of the opportunities for trade thereby afforded.

76. But the equal voice accorded to large and small tribes alike in the votes of the Amphictyonic Council speedily robbed its conclusions of binding force in even the international politics of the states concerned. The powerful members of the Amphictyony naturally would not heed the dictation of its insignificant members. Rules there were by which each state in the league was bound under oath not to destroy any Amphictyonic town, not to turn away from it at any time its running waters, to join heartily in every duty which looked to the protection of the Delphic temple, and in other respects to observe, at least within the limits of the league, humane standards of conduct both in war and in peace as well as faithful standards of coöperation in all matters touching

the worship of the divinity in whose name the association was formed. There were germs in the constitution of the Delphic Amphictyony on the one hand of national unity, and on the other of international comity and morality. But these germs were never developed. The disintegrating forces of Greek politics were too strong to be stayed by the mild forces of religion.

The Amphictyonic bond was never, perhaps, a close one. During the central, most celebrated period of Hellenic history the influence of the league utterly disappears from politics; and, when in later times it again emerges, it is only to plunge Greece into "sacred wars" which afford Macedonia her opportunity for the destruction of Greek independence, and in the conduct of which almost every humane and religious purpose of the Amphictyony is flagrantly neglected.

77. **The Delphic Oracle: its Influence.** — None the less, the oracle at Delphi, whose shrine the Amphictyony had been organized to protect and honor, exercised an abiding influence upon Greek life throughout the length and breadth of Hellas. Its shrine has been called "the common hearth of Hellas," the centre towards which the faith and reverence of the great Greek family turned as towards the home of their religion, the symbol of their oneness. The Romans, — even the Romans of the time of the Empire, — consulted the oracle, so great was its fame and authority; and in the Greek world almost every considerable undertaking awaited its sanction. Its responses were generally, in cases of difficulty or of controversy between two powerful states, given with great wisdom and circumspection. Those who acted as the mouthpieces of the god acquired a facility and felicity in the utterance of double, as well as of sage, meanings which saved the reputation of the oracle in all cases by virtue of a possible twofold interpretation of its response. Though the influence of the oracle waned, like all other influences of the older religion, in the later periods of Hellenic history, its power was very slow indeed to disappear altogether. Its formative authority must be put prominently forward in any estimate, however slight, of the nationalizing forces operative in the history of the Greeks.

78. **Political Aggregation: Achæan Supremacy.** — Such political cohesion as the cities of Hellas here and there had was given them, not by community of religious feeling, but by the compelling power of some dominating ruler or strong, aggressive city aristocracy. The story of the Trojan war supplies us with a type of the only sort of empire that Greek politics was ever to produce: the supremacy of one city over many others. Agamemnon, king of Mycenæ, was leader of the Greeks against Troy because

Mycenæ was the leading state of Greece. Mycenæ, lying inland in the northwestern portion of the great peninsular plain of Argolis, and Tiryns, placed just at the head of the Argolic Gulf, were the seats of the dominant forces of Greek politics in that antique time. Built, doubtless, by immigrants direct from Phrygia, they nevertheless figure in the Homeric songs as the regnant cities among the Achæans of the Peloponnesus. So controlling is the part played by Achæans in the Trojan expedition that Homer again and again uses 'Achæan' as synonymous with 'Greek.' Tribes from every quarter of the central Greek lands recognized the king of Mycenæ as their natural leader: for Mycenæ dominated Sparta, Argos, Corinth, and every other Peloponnesian community, and these Achæan communities of Peloponnesus were the prevalent powers of Greece.

79. **Cretan Power.** — Of a like pattern was the supremacy said to have been established in Crete by the mythical king and lawgiver, Minos. At some time in that heroic period to whose events no definite dates can be assigned, Minos, ruler of Cnossus in Crete, was thought by the Greeks, not only to have brought within his power many of the other Hellenic cities of the island, but also to have constructed something like an empire out of the numerous island states of the southern Ægean, establishing a naval force which swept the sea of pirates, and giving to the cities under his sway a system of laws which was a prototype of the later and more famous laws of Sparta.

80. **The Supremacy of Argos.** — Later, Argos gained a like temporary ascendency in the Peloponnesus. Under Phidon, a lineal successor of the Heraclidæ, and therefore a rightful representative of Dorian supremacy, a man of imperative initiative and commanding ability, Argos dominated the cities of Argolis, and even led for a time the whole of the Peloponnesus. Phidon used his power to substitute Argos for Elis in the presidency, for a single occasion, of the Olympian games.

81. **Games and Festivals: the Hellenic Spirit.** — To preside at Olympia was to preside, for the nonce, over all Hellas: for nowhere did the pan-Hellenic spirit speak with so plain and so impressive a voice as at Olympia. There every four years Greeks gathered from all quarters of the Hellenic world to hold games in honor of Zeus, their national deity. With equal frequency

the Greek world sent its crowds of spectators, its picked athletes, its poets, historians, and musicians to the great Pythian festivals, in honor of Apollo, at Delphi. Every third year the Ionian Poseidon was celebrated with almost equal splendor in the Isthmian games, held under Corinth's presidency. Zeus had his famous games and rites every third year at Nemea also, in Argolis. But no festival had quite the celebrity and influence enjoyed by those which every fifth year witnessed at Olympia, in Elis. The Greeks reckoned time by 'Olympiads,' by the four-year periods, that is, which elapsed between festival and festival at Olympia. To win a prize in the Olympian games was to win immortality. Thither poets went to publish their poems to all who would listen. Embassies came from every Greek city of consequence, on the mainland of Greece at any rate, to take solemn part in the ceremonies by which the religious motives of the gathering were proclaimed. Those who were not Greeks could be present as spectators; but no one who could not prove himself of pure Hellenic blood and free from all taint of sacrilegious crime could take part in any contest. The period of the games was made a period of peace, of truce: war stood still while the Greeks thus gave token of their common national spirit, of their race unity in religion and in standards of achievement. It is scarcely possible to exaggerate the influence, both political and moral, of these festivals. The persistency and enthusiasm with which they were celebrated throughout fully a thousand years gives impressive evidence of their significance in Greek national history.

Still, although they spoke a national spirit, they did not secure political unity. Nothing but strength, nothing but arms or self-interest, furnished means sufficient for even those temporary, ephemeral unions of Greek cities which once and again seemed for a moment to be bringing sections of the Hellenic world into the possession of better, because more national, political methods.

82. **The Delian Confederacy.** — The most celebrated, and in its early days most promising, of the combinations by means of which a certain degree of Hellenic union was secured was the Delian Confederacy. In resisting the Persian invasions of B.C. 490 and 480 the cities of European Greece had looked to Sparta as their leader. But the two campaigns resulted in bringing Athens for-

ward as the most effectual representative of Greek independence; and the turn which the contest with the Persians took, so soon as Marathon, Salamis, and Platæa had thrust the invaders out of Greece, made Athens the only possible leader. Immediately after these victories the Hellenic states of the Ægean joined the states of the mainland in following up the military advantages already gained and in driving the Persians back from Asiatic as well as from European Hellas; and in this movement, as in the earlier defence of the peninsula, Sparta led. But Sparta soon found that such leadership threatened to result in the breeding of generals whose personal power would be full of peril to her aristocratic constitution. She was, besides, not fitted, either by position or by political constitution, to play the part of a naval state: and yet it must be a naval state that should lead the Ægean and Asiatic communities in their contest with the common enemy. Sparta, therefore, withdrew, and Athens became her natural successor in the hegemony.

83. The result was the re-formation of the league; or, rather, the formation of a new league. This league was the Delian, formed about B.C. 475. It embraced most of the Ionian states of the archipelago and of the Asiatic coast. Delos was chosen as the seat of its treasury and the meeting-place of its assemblies, not only because of its convenient central location, but also because it possessed one of the most ancient and revered of the shrines of Apollo and could therefore furnish for the league that religious background which was indispensable to Greek thought in the construction of confederacies. About the shrine in Delos the confederates gathered as an Amphictyony. Organization was effected under the wise and eminently conservative guidance of Aristides: and that organization promised to be effectual. The league had a treasury filled by stated contributions from all those members of the organization who could not themselves furnish men and vessels to the confederate fleet; that treasury was administered by permanent officials (*Hellenotamiæ*) trained for their functions in Athens; its assembly met statedly; it maintained a great fleet constantly upon the seas: in all respects it was the most compact, most energetic, most promising political combination that Hellas had yet seen.

84. **Athenian Empire.** — But the confederate features of this combination speedily disappeared. From the first Athens had had, not the presidency only, but also the control, of the league. Her citizens administered its treasury; she commanded the confederate fleet; both in material power and in political capacity she immeasurably excelled all the other confederates. Many of the confederate states, too, played into her hands. They preferred to pay money into the treasury rather than be at the trouble of supplying men and ships, — and Athens made no objection to the change. Presently she transferred the funds to her own coffers, and did not scruple to use them to pay for the magnificent buildings and the matchless works of art with which, Pericles being master of her policy, she adorned herself. In every way, indeed, the money of the confederacy was made to simplify Athenian finance. When members of the league tried to withdraw from it, they found themselves coerced by Athens into remaining, being obliged either to pay a heavy tribute for their recalcitrancy or to submit to be ruled direct from Athens. The later days of the league saw Athenian officers of oversight established in many of the towns which had once been equal members with Athens in the confederacy, and in some, Athenian garrisons. When necessary or expedient, Athens strengthened her control by new and separate treaties with the stronger towns under her hegemony. The Delian Confederacy had become an Athenian Empire.

It was the resources wrung from this empire that rendered the finances of Athens so easy of management in the time of Pericles; and it was the success of the finances, probably, which gained for his policy of making money payments to the people (sec. 155) the tolerance of the richer classes of the citizens, and prevented the fatal consequences of that policy from making themselves at once manifest.

85. **The Peloponnesian War: Oligarchies vs. Democracies.** — This empire had hardly been secured when Spartan jealousy brought about its downfall. The Peloponnesian war was fought nominally because Athens took Corcyra's part against Corinth, Corcyra's parent city, but really because the power of Athens had become too great to be longer brooked by the Peloponnesian states. Most of the more powerful states of the Peloponnesus, besides,

had oligarchic or aristocratic constitutions, and Athens was the representative and embodiment of democracy. That Peloponnesus, with Sparta at its head, should strike at Athenian supremacy was inevitable.

The result of the war was to make Sparta supreme. But she used her supremacy to humiliate, not to unite, Greece. She put garrisons and military governors (*harmosts*) in every city convicted or suspected of disaffection towards her. It was impossible that Ægean Hellas should long be held together by the hateful methods of her drastic tyranny. Accordingly, Sparta steadily lost her ascendency.

Athens, on the other hand, gradually recovered much of the ground she had lost; gathered about herself a new and more extensive league, including not only many of her old allies, but also Dorian and Eubœan commonwealths not a few, and even, for a time, Macedonian and Thessalian princes; conducted herself with an unwonted moderation, dictated by sad experience; and had the satisfaction of seeing Peloponnesian fleets again and again driven from the Ægean. Sparta was forced to be content to be the chief among oligarchies and to leave the principal rôle in Greece to democrats.

86. Meantime Thebes was brought to a sudden and short-lived supremacy by the genius of Epaminondas, utterly defeating the Spartans at Leuctra (B.C. 371) not only, but also making forcible and radical readjustments in the politics of the Peloponnesus.

87. **Macedon.** — But nothing that any Greek city could do proved effectual in uniting the Greeks: confederacies and hegemonies alike were ephemeral. It remained for Macedon and Rome to do for them what they could not do for themselves. The Macedonians were cousins to the Greeks, having much Hellenic blood in their veins, — though just how much we cannot say. They were quite near enough of kin to understand Greek character and politics thoroughly, and to make their assumption to lead Greece seem not altogether unnatural. Philip of Macedon knew his object perfectly, easily divined the means of attaining it, and advanced towards it with consummate craft, energy, and success. First, he conquered the outlying Greek cities nearest to his hand;

next he intervened in a "sacred war" — a war among the Amphictyons concerning Delphi — by which Greece was torn, and won a place in the Amphictyony itself, as a Greek power; and then, turning to the completion of his designs, he crushed Athens (Chæronea, 338), reduced the power of Sparta, and, establishing himself in the presidency of the Amphictyony, brought the states of European Greece together into a nominal league which was in reality a Macedonian empire. Central Greece was at last compacted for a national undertaking, — the Hellenization of the East.

88. **The Hellenization of the East.** — That Hellenization followed the conquests of Alexander the Great. Alexander moved against Persia as the leader and representative, because the master, of the European Greeks. His armies were Greek, in large part pure Greek, and the regions which he conquered were regions opened thereby to the Greeks. Alexander himself did not live long enough to do much more for the permanent alteration of eastern civilization than clear away obstacles to the spread and predominance of western arts and ideas, and create the highways of political organization upon which Greek influences were to advance into Syria and Egypt. The great changes which were to make the East Hellenic took place under his successors, the Diadochi, amidst the wars by which they sought to establish upon firm foundations their series of independent Græco-barbarian kingdoms. The process was easiest, of course, in Asia Minor, and most nearly resulted there in a veritable Hellenization; but even in Syria and Egypt it made notable strides, leaving Greek cities like Antioch and Alexandria to attest its vigor, and subduing to Greek influences much important Mediterranean coast country.

89. The East was by no means, however, made Greek in any such sense as that in which the Ægean coasts of Asia Minor had so long been Greek. The Greeks, though they became exceedingly numerous and easily dominant in the new kingdoms, did not anywhere, probably, constitute a majority of the population. Nor were they Greeks, for the most part, who would have been permitted to contend in the games at Olympia. Macedon's supremacy and eastern conquests had produced a new Greek race, with

deep infusions of Macedonian and barbaric elements both in its blood and in its manners. It was on that very account the better adapted to establish a new civilization, which knew little of the old Greek liberty or variety, — an orientalized Greek civilization. It was not stiffly retentive of exclusive characteristics, like the pure Hellenic; it was receptive of outside influences, open to compromise, submissive to rulers.

90. The Macedonian kingdoms amalgamated the East and gave it that individuality which, after Roman dominion had spread to it, was to enable it still to occupy a place apart in the Roman system, and was to cause it ultimately to emerge from that system a distinct, separate, self-sufficing whole, the Eastern Empire (secs. 239, 240).

When Constantine transferred the capital from Rome to Byzantium, he of course shifted the centre of gravity from the Latin-Teutonic to the Greek side of the Empire. In the time of Justinian Greek was the prevailing language and the chief imperial officials were Greeks.

91. The older Greek cities of the Ægean coast of Asia Minor had been prepared by their earlier history to fall easily into a system like that established by Macedon. Denying themselves the strength that lies in union, they had singly succumbed, first to semi-barbarian Lydia, and afterwards to wholly barbarian Persia. It was no new thing with them, as it was with Athens and Thebes and Sparta, to become material in the hands of a conqueror, constituent parts of an empire.

92. **The Achæan League.** — The period of Macedonian supremacy, period though it was of the final decline of Greek liberty, nevertheless witnessed one of the most brilliant attempts at national action on the part of the Greeks. The Achæans, who ever since that heroic age of the Trojan expedition when they had been leaders of all Greece (sec. 78) had stood in the background of Hellenic history, working out their own quiet developments in comparative peace and prosperity in secluded Achaia, now again, in the closing age of Greek history, stepped forward to a new leadership and initiative. The cities of Achaia had from time immemorial acted together under some form of political association; but their union did not become significant in the history of Greek politics until the year B.C. 280. In that and the previous year

several Achæan towns took heart to cast out their Macedonian masters, and, having liberated themselves, drew together for mutual assistance, making a common cause of their liberty. The spirit of other towns kindled at the example, and the movement spread. Presently all the Achæan towns had become free, and the league sprang into importance. Sicyon, which was not an Achæan town, threw in her lot with it and gave it, in the person of her own gallant Aratus, a leader who was speedily to make it famous and powerful. Under his leadership it became instrumental in delivering Corinth and other neighbors from their tyrants. Year by year saw fresh accessions to its membership till it included Megara, Trœzen, Epidaurus, Megalopolis, and even Argos. For half a century it served as an admirable organ for the national spirit of the Greeks; for a full century it retained no small degree of credit; but finally, of course, it was drawn, like all else, into the vortex of Roman conquest. It may be said to have been the last word of Greek politics.

93. And in its constitution it spoke a rather notable word for the politician. That constitution brought the world within sight, perhaps, of a workable confederate arrangement. The league acted through an assembly which met twice every year and to which was entrusted, not only the election of all confederate officials, but also the supreme direction of every affair which affected the foreign relations of any city in the league, even though it were an affair not of general but only of local interest. The business of the assembly was prepared by a Council (*βουλή, boulē*) which was probably permanent. Its officers were, at first two Generals (*strategoi*), afterwards one general and a chief of cavalry known as *Hipparchus*, as well as certain subordinate general officers; a Public Secretary (*γραμματεύς, grammateus*); and a permanent executive committee of ten known as *Demiurgi*. The board of executive officers, it is believed, presided over the sessions of the Assembly.

94. Here, certainly, was a better framework than the Greeks had ever known before for concerted national action. Its chief defects lay in the composition and procedure of the Assembly. That body was composed, in theory, of every freeman of the cities of the league who had reached the age of thirty years. In fact,

of course, it consisted of the whole body of the freemen of the town where it met (usually Ægium, or, in later days, Corinth), and of such citizens of the other towns as had the leisure or the means to attend. The ancient world knew nothing of the device of representation which has solved so many problems of political organization for the Teuton. And the votes in the Assembly were taken by towns, not decided by the major voice of the freemen present. The few chance attendants from some distant city within the league spoke authoritatively for their fellow-townsmen: the smallest delegation had an equal vote with the largest; and yet there was no fixed plan which would make the vote of one delegation as representative as that of another.

95. **The Ætolian League.** — The same period saw another league spring into rivalry with Macedonia on the one hand and with the Achæan towns on the other, whose constitution bears so close a resemblance to that of the Achæan confederation as to suggest the prevalence in Greece of common conceptions, or at least of common habits, of political association. The Ætolian League, like the Achæan, had its general assembly of freemen; the business of that assembly was prepared by a committee whose functions resemble those of the Achæan Council; the chief executive officer of the league was a *Strategus;* his associate in command was dubbed *Hipparchus;* and a Public Secretary (*grammateus*) served the league in its formal transactions.

96. But these likenesses ought not to be too much insisted upon. We know less of the actual confederate life of the Ætolian League than of that of the Achæan, and what we do know reveals certain important differences between the two associations. The Ætolian League was not a confederation of cities, but a confederation of tribes. Nor was the leadership which the Ætolians acquired through their league like the leadership which fell to the Achæan towns. The Ætolians inhabited a country backed by impenetrable mountain fastnesses to which they could retire, to the defeat of all outside coercion. Their aggressive and lawless natures led them to make of their neighborhood to the sea an opportunity for wide and successful piracy. Their power and their energetic initiative created for them a sort of empire: at one time all of Southern Epirus, Western Acarnania, Thessaly,

Locris, Phocis, and Bœotia were included in the league, and it even had allies in Asia Minor and on the Propontis. It "assumed entire control of the Delphic oracle and of the Amphictyonic assembly." Its leadership was a purely military leadership, presenting salient points of contrast to the association by means of which the Achæan Confederates sought to secure themselves in the enjoyment of peace and liberty.

97. Every freeman of thirty years of age was entitled to membership of the Assembly of the League. That assembly met, not twice, but once a year, in the autumn, at Thermum, and was attended, of course, only by those who could afford to attend: that is, by the dominant few.

The Assembly did not select the *Strategus* of the League, but a list of nominees for the office, — from which a *Strategus* was picked out by lot.

The *Strategus*, not a board of magistrates as in Achaia, presided over the meetings of the Confederate Assembly; and to him were entrusted, besides his military, certain general civil and representative functions.

The Ætolian, like the Achæan League, was eventually, of course, swept into the Roman vortex.

98. **Rome and the Western Greeks.** — Western Hellas, after having been at some points touched by Carthage, had been absorbed by Rome before the imperial city had sent her armies to intervene in the factional fights of Greece proper. The cities of Magna Græcia Rome acquired when she completed her conquest of the Italian peninsula, B.C. 272. Sicily, with its Greek and Carthaginian settlements, she acquired in B.C. 241, and organized as a province in B.C. 227. The other western homes of the Greeks she made her own along with Spain and the coasts of Gaul.

99. **After Roman Conquest.** — Rome neither undid the work of the Macedonian princes in Asia Minor and Syria, nor thoroughly Romanized there the systems of government. The vitality and self-direction of the semi-Greek municipalities of the East in large measure weathered Roman rule, as did also the Greek speech and partially Hellenized life of Asia, Syria, and Egypt. The compound of oriental, Greek, and Roman methods in government which was effected by the later emperors, when Greek Byzantium had become the imperial capital Constantinople, may be best discussed in direct connection with Roman political development (secs. 228–240).

The Greek settlements of Sicily, Italy, Gaul, and Spain were much more completely swallowed up and assimilated by Roman organization.

Sparta.

100. **Greek Constitutions.** — It would no doubt be possible, by piecing together such details as have come down to us concerning the various governments of scattered Hellas, to construct something like a general picture of Greek politics and administration. But those details are not many: the lines of the picture would be everywhere too broad and vague, and we should bring away from it hardly more than a body of conjecture. We shall better serve our object by a study of the governments of Sparta and Athens, concerning whose constitutions we have very definite and reasonably complete information. Sparta cannot, indeed, be taken as a type, for her constitution seems to have stood almost if not quite unique in the Hellenic world. It deserves study for its singularity, its stability, its persistent efficiency. The constitution of Athens, on the other hand, may fairly enough be taken as typical of Greek life and politics. The two constitutions together supply a sufficient range and variety of institutional arrangement to enable us to appreciate the versatility of the Greek political genius, — a genius at once subtle and practical, with a touch too much, it may be, of nice invention, and yet steady withal and sagacious.

101. **Fixity of the Spartan Constitution.** — It was the circumstances of her history which gave to the constitution of Sparta a character in many respects unique, and secured to it an immunity from change which provoked at once the wonder and the envy of the rest of Greece. Throughout almost all of that chief period of Greek history with which the Greek writers have made us familiar, — from the time of Solon, namely, till the decline of Athenian power and independence, — the Spartan constitution retained substantially the very form it had had when Sparta first emerged into the field of history. All its features are at once ancient and perfectly preserved.

102. **The Spartans a Garrison of Conquerors.** — The Spartans had come as conquerors into the valley of the Eurotas. They were of the number of those Dorians with whose invasion of Peloponnesus visible Greek history may be said to begin, and their hold upon their kingdom had been gained only after many

decades — it may be only after several centuries — of hard fighting advanced inch by inch. Their numerical strength was not great, probably at no time exceeding fifteen thousand; they lived in the midst of a forcibly subjected population, from eight to ten times more numerous than themselves; and they had, consequently, to maintain their supremacy rather as a garrison than as hereditary heads of a normal body politic.

103. **Slaves and Helots.** — There was no considerable body of domestic slaves in Sparta. Slaves there were, indeed, but their number was never large; there being probably only enough to supply the wealthier families with household servants and the state with drudges. The burden of all the other services that were required in the simple life of the Spartan state fell upon a body of serfs called Helots. The Helots constituted the lowest rank of the subject population of Laconia. They were, doubtless, descendants of the original inhabitants of the country, and owed their degradation to what, had fortune favored them, would have been accounted a reason for giving them all honor, — their desperate resistance to the advance of the conquering Dorians. They are said by some, indeed, to have received their name, of Helots, from a town called Helus which had been the last to yield itself to the conquerors, or the most stubborn in revolt against their dominion when that dominion was young. Their punishment had consisted in being chained, not to masters, but to the land which had once been their own. They were slaves of the soil, rather than of the soil's usurping masters. Though absolutely without freedom, they were not personal property, to be sold or exchanged in the market like the poor creatures who thronged the slave-pens of Delos and Byzantium. They could not change service save as inseparable appendages of the lands upon which they served. They were, consequently, not at the mercy of the individual caprice of their masters, but had themselves something of the inviolability of the property to which they were attached. They passed with it, as part of it, and could not pass otherwise without special legislative warrant. Neither could they be killed or misused by their masters without public authority, or at least some colorable pretext of the public safety. And, inasmuch as they were thus a part of the real estate of the

country, — its motive part, its machinery of production, — and hedged about by the same laws that regulated the usufruct of the land, they were allowed to retain, for their own sustenance, a certain portion of the products raised by their labor, that, as servants of the land, they might derive their support from it. In a sense, they belonged to the state; for the state controlled, as itself supreme owner, the ownership of the land to which they were attached. They looked to the state alone, therefore, for any measure which was to affect their condition for better or for worse: for new restrictions in consequence of their turbulence or threatening discontent, or for emancipation in return for such services as they were occasionally able to render in war.

104. **The Periœci.** — Sparta was not the lonely mistress of an empty land, where there were only Helots and their taskmasters living upon scattered farms. Inland towns stood about her on either hand, up and down the spreading valley of the Eurotas; the coast was dotted all the way from Argolis round about to Messenia with cities that showed a busy trade, and wrought at iron and other stuffs which the world stood ready to buy; Arcadians, Ionians, Achæans, men of the various branches of the old race, made up the tale of their population; and they were not Helots. They were not Spartans, indeed, but *Periœci*, neighbors, native provincials, of whom the Spartans had made subjects, but to whom freedom was left, if not political privilege. Not all stood upon the same footing; they had been conquered at different times, and had, no doubt, made different terms of submission. Some, perhaps, were obliged to receive Spartans into their chief offices; all had to pay a stated tribute; all were bound to supply troops in time of war; some found a hard discipline put upon them if they were not always submissive enough; none dared resist encroachment; but in the main their people were free, though dependent. Their municipal affairs were, for the most part, and at all ordinary seasons, in their own hands. They might enrich themselves with trade and manufactures as they pleased, so long as they yielded Sparta her full tribute. Their lot grew steadily worse, no doubt, as Spartan power hardened in the face of difficulty; but, for the rest, they lived their own lives, throve modestly, and earned for Laconia the title of "the land of

a hundred towns." Without them, Sparta, with her garrisoned citizens, would have lacked, not troops only, but money, and many a needed source of supply.

Other inferior classes there seem to have been, occupying positions intermediate in point of privilege and consideration between the dependent Helots and *Periœci* on the one hand, and the supreme *Spartiatæ* on the other; but of them we know little that is satisfactory or significant. Such glimpses as we get of them add almost nothing to our knowledge of Spartan life and politics.

105. **The Spartiatæ: Property Laws and State Guardianship.** — The *Spartiatæ* were the only citizens. The *Periœci* outnumbered them three to one, the Helots probably twenty to one; but only blood counted for aught in the Spartan state, and nowhere was a dominant class more successful in maintaining a rigorously exclusive privilege. Throughout all that period of Sparta's history which is best known and best worth knowing, no democratic revolution made any headway against this active, organized, indomitable band of *Spartiatæ*, who held the state as an army would hold a fortress. Among themselves Spartans were *Homoioi* (Equals); and in the earlier days of their government every means was employed to make and keep their equality a reality. In nothing was this purpose more apparent than in the system of land tenure. There was private property in land among the Spartans; but the state was, as I have said, regarded as the original proprietor of the land, and individual tenure was rather of the nature of a usufruct held of the state and at the state's pleasure than of a complete ownership. The purpose of the early legislation was to make the division of the land amongst the Spartan families as equal as possible; and the state frequently resumed its proprietary rights and reapportioned estates when grave inequalities had crept in, without a suspicion in any quarter of confiscation. It was a primary care of the state to keep its citizens rich in leisure, in order that they might live entirely for the service of the state and feel no necessity to engage in a pursuit of wealth, which would not only withdraw them from their bounden political duties, but also rob them of social consideration. It accordingly undertook the patriarchal duty of administering the wealth of the country as trustee for the citizens. It not only redistributed estates;

it also compelled rich heiresses to marry men without patrimony, and grafted the poor upon good estates by prescribed adoption. It followed, of course, from such laws, that adoption was not permitted to swell the numbers of any family without state sanction being first obtained, that wealthy heiresses were not allowed to throw themselves away on rich youths, and that landed estates could be alienated from the family to which the state had assigned them neither by sale nor by testamentary bequest. Citizens were both wards and tenants of the state.

106. Doubtless, however, it was only in the earlier periods of this constitution that this patriarchal guardianship and proprietorship of the state was freely and effectively exercised for the purposes intended. It is certain that in later times great inequalities of condition did spring up among the so-called Equals; so much so that they fell at last into two distinct classes, the Few who were rich, and the Many who were comparatively or utterly poor. All *Spartiatæ* were no longer upon the same political level even, but some were *Homoioi* and some *Hupomeiones* (Inferiors).

107. **The Two Kings.** — The government which the *Spartiatæ* conducted is at every point in broad contrast to the governments of which Athens was a type. Fortune had given Sparta two kings. Tradition held that the Dorian invaders had, upon entering the Peloponnesus, allotted its various districts to their several Heraclid leaders; that Aristodemus, to whom Laconia had been assigned, died before conquering his kingdom, leaving twin sons, Eurysthenes and Procles; that the mother of the boys declared herself ignorant which of the two was born first; that the Delphic oracle, when called upon to arbitrate the claims of the brothers, commanded that they should both be crowned and given joint and equal authority; and that from these two brothers had sprung the two royal houses which reigned in Sparta. Whatever the origin of this double kingship, Sparta continued to have two kings till she had gone far in that decline which preceded Roman conquest. Their nominal functions were not widely different from those which we have seen the Homeric kings exercising. They "were representatives of the state in its dealings with the gods, deliberative and judicial heads of the people in time of peace, and

commanders in time of war."[1] The very great limitations by which their prerogatives were in fact surrounded will appear in what remains to be said of the other institutions of the state.

108. **The Council of Elders.** — In deliberation and legislation they were, still after the manner of the Homeric constitution, associated with a *Gerusia* (γερουσία), or Council of Elders. The members of the *Gerusia*, however, unlike the Elders of the more ancient Council, were elected by the popular Assembly (sec. 110). They were twenty-eight in number (constituting with the kings, a body of thirty); only those who were of noble blood and who had reached the age of sixty (the age at which liability to military service ceased) were eligible to membership; and those who were elected held office till death. As a court of justice, the *Gerusia* had jurisdiction over the kings, over capital and other grave criminal offences, over all state trials, and over cases of *atimia*, or attainder. As a legislature, its functions were in part sovereign, in part *probouleutic;* it acted finally upon most administrative matters of importance, and prepared by preliminary decree the legislative measures which were to be submitted to the vote of the popular Assembly. It stands in character and functions half-way between the Athenian Senate of the Areopagus and the Athenian Senate of Four Hundred (secs. 131, 134).

109. **The 'Apella,' or Assembly.** — The *Apella*, or Assembly, consisted of all citizens (that is, all *Spartiatæ*) over thirty years of age. The matters which were referred to its vote were, disputed successions to the throne, the appointment of generals, the election of magistrates and *Gerontes* (Elders), war and peace, treaties with foreign states, and, perhaps, all changes of law. I have said only that these matters were referred 'to the vote' of the Assembly because they were not referred to its consideration. No place was given in the Assembly to real deliberation; only the kings, the ephors, and the *Gerontes* could either make a motion or take part in debate. Indeed, debate was a thing hardly known in Sparta, where every man was taught to despise the talker and to admire the man whom later times were to dub the 'laconic' man. The utterances of the magistrates and senators in the

[1] Schömann, p. 227.

Assembly were probably curt opinions packed into a few scant sentences. And the voting was as informal as the debating. A division was never restorted to; a *viva voce* vote decided. It lay with the ephors, moreover, who presided in the Apella, to declare upon which side the preponderant voice had spoken in the vote; and it is not to be doubted that they often heard as they chose. It was within the choice of the *Gerusia*, besides, to take the vote of the Apella as decisive or not as they chose, — at any rate in all administrative and political matters.

110. **Election of Elders.** — Only in the election of *Gerontes* was a different and more elaborate procedure observed. Then, after the Assembly had convened, several persons selected for the purpose stationed themselves in a building near the place of assembling, from whence they could get no view of the Assembly, but where they could hear the voices of the assembled people. Upon the completion of this arrangement, the candidates for the *Gerusia* passed through the Assembly, in an order determined by a lot whose result was unknown to the listening committee near by, and the choice of the Assembly was ascertained by the decision of the concealed deputation as to which of the successive shouts of applause that had greeted the candidates as they made their appearance had been the most spontaneous and full-throated. This election by applause was, of course, just an elaborate form of *viva voce* voting.

111. **The Ephors.** — The most notable and powerful office known to the constitution of Sparta was the office of Ephor. It was an office, there is reason to believe, of great antiquity; but development had hurried it very rapidly away from its early form and character. The five Ephors (or Overseers, for such is the meaning of the title) were originally mere deputies of the kings, appointed to assist them in the performance of their judicial duties, to act as vice-regents in the absence of their royal principals, to supervise in the name of the kings the other magistrates of the state, to superintend, under the same authority, the public discipline, and to summon, by royal warrant, the *Gerusia* and the Assembly; in short, to serve in all things as the kings' assistants. But gradually, through the operation of causes for the most part hidden from our view, but possibly in part because they sympathized more with the citizens from whose ranks they were yearly drawn than with the kings who appointed them, and in part because they were chosen by two kings not always harmonious in their counsels or

purposes, and were thus kept out of sympathy with the royal administration as a whole, the ephors drew steadily away from the control of the kings, until at length their power was not only independent of the authority of the throne, but even superior to it. There is no clear evidence to show when the choice of the five ephors passed from the kings to the Assembly; but the ephors certainly exchanged their character of representatives of the kings for that of representatives of the state and virtual masters of the kings, — overseers of the chief magistrates as well as of all others. The kings were obliged every month to take an oath to this supreme board of five to exercise their prerogatives according to the laws; the ephors, on their part, undertaking, on behalf of the people, that so long as this oath should be observed the kings' power should pass unchallenged. Every nine years the ephors asked of the gods a sign from the heavens as to whether anything had been done amiss by the kings, and if the heavens showed any sinister omen, the conduct of the kings was, upon the initiative of the ephors, investigated by the *Gerusia*. Private individuals, besides, could bring charges against the kings to the notice of the ephors, and it rested with them to dismiss the charges (to answer which they could summon the kings before them), or to push them in the *Gerusia*.

112. Of course, if masters of the kings, the ephors were masters of all others in the state also. They could interfere, with full power to investigate and to punish, in every department of the administration; the supervision of the public discipline, and consequently of the private life of every individual, rested with them as overseers of the special officers of the discipline; they presided both in the *Gerusia* and in the Assembly; could summon either body when they wished, and lay before them any matters they pleased. They were the treasurers also of the state. In everything they were the supreme authority. The limitations of their power lay in the fact that they were a board of five men and could do nothing of importance except by a unanimous resolve, and that, their power lasting but a single year, they would presently become private citizens again, liable to accusation and punishment by their successors. They could no doubt determine, however, who their successors were to be by exercising arbitrarily,

when they dared, their power to interpret the *viva voce* vote of the electing Apella.

One of the board, like one of the Athenian archons, was Ephor *Eponymus*, giving his name to the civil year.

113. **The Administration of Justice.** — With reference to the administration of justice in Sparta we are not able to say much more than that the law was interpreted and applied by the kings in cases relating to the family, to inheritances, or to the redistribution of property by marriages between rich and poor (the kings being, so to say, Chancellors, and families wards in Chancery); that cases affecting the kings themselves or involving the graver sort of crimes were heard by the *Gerusia;* and that all other cases were determined by the ephors or by lesser magistrates. There were no popular jury-courts.

114. **The State Discipline.** — But the feature of their constitution which chiefly preserved the supremacy of the *Spartiatæ* over the subject population of Helots and *Periœci*, and made Sparta Sparta in the eyes of the rest of the world, was the State Discipline. Every Spartan lived the life of a soldier in garrison. He did not belong to himself, but to the state. He was taken from his parents at seven years of age, and from that time until he was sixty lived altogether in public, under a drill of muscle, appetite, and manners such as not even a modern professional athlete could well imagine. From seven to thirty (thirty being the age of majority in Spartan law) he was schooled to endure the roughest fare, the scantiest clothing, the poorest lodging, and the completest subordination to his elders. After thirty he acquired certain political and social privileges: he was then a citizen, and he could marry; but even then he was permitted no essential change of life. He was expected to keep up his athletic habit of body, he must still eat at the public messes, could have no home life, but must see his wife only infrequently for a few minutes, or by stealth. He *must* marry, — the state required that of him, — and must consequently maintain a household. He must also contribute his share of money and supplies to the public messes (*Syssitia*). Only when he had passed his sixtieth year could he in any measure lead his own life or follow his own devices.

It was probably failure to comply with the requirements of this discipline or to contribute the required quotas to the *Syssitia*, that degraded *Spartiatæ* from 'Equals' to 'Inferiors' (sec. 106).

115. This discipline included the women only during their youth; girls had to 'take' gymnastics as the boys did; but they did not go into the discipline of the men. All education which we should account education was excluded from the system. Only music of a rude sort, the use of simple stringed instruments and a taste for the songs of war, softened the constant training of sense and sinew. The product was a fine soldiery and capital soldiers' mates, — shapely, coarse, sturdy women, and lithe, laconic men.

116. **Principles of Growth in the Spartan Constitution.** — The constitution of Sparta, for all it is so symmetrical, is not to be looked upon as a *creation*, any more than is that of any other Hellenic city. The mind must not be misled by the fact that in describing it we are under the necessity of taking it at some one moment of complete crystallization into supposing that such was exactly its form at every period of its history. It was, like every other constitution, a slowly developed organism. It early took a peculiar form, and long preserved it, because of the peculiar situation of the Spartans, who were few and had to hold their power against a hostile subject population greatly superior to them in numbers. They could not venture to relax for a moment their internal discipline; and so it happened that throughout the period during which history is most concerned with Sparta her constitution remained fixed in a single form. But afterwards it passed through the same stages of tyranny and democracy that had long ago come to Athens. The non-citizen classes eventually broke their way in large numbers into the constitution, and the Romans found Sparta not unlike the other cities of Greece.

117. **Lycurgus.** — The Spartans themselves, however, as I have said in a previous chapter (sec. 15), regarded their constitution as a creation, and the creation of one man, Lycurgus (B.C. 820). To him was ascribed a rearrangement of the three tribes which constituted the state, a division of land between *Spartiatæ* and *Periœci*, the institution of the *Gerusia*, a provision that there should be monthly meetings of the Assembly, and, above all, the

creation of the celebrated system of state discipline. It is not at all improbable that he was in fact very largely instrumental in giving to the constitution the particular form in which we have seen it. But it is extremely improbable, if not intrinsically impossible, that he can have done much more in the way of effecting actual fundamental changes than did Solon or Clisthenes at Athens. The Spartan constitution had probably made no leaps or bounds; Lycurgus, doubtless, only guided its course at a very critical, because consciously formative, period.

Athens.

118. **The City of Solon: Kingship gone.** — We get our first distinct view of Athenian affairs in the time of Solon, to whom Athens attributed her first great reform code. The Solonian constitution is by no means so well known as historians could wish; but its main features may be said to be beyond dispute, and these features speak very plainly of a society quite unlike that of the primitive Greek 'city.'

Solon was put in charge of the city's affairs by being chosen 'Archon.' The ancient kingship had disappeared, the archonship was one of its fragments. The abolition of the kingship had doubtless come about through an aristocratic revolution, such as Aristotle afterwards noted as altogether a normal movement in Greek politics. The 'kings' of the Council had grown by degrees quite intolerant of the authority of *the* king, their patriarchal president. He stood for the growing state; they, only for the disintegrating *gentes*. His hereditary headship was threatening to overshadow permanently their individual part in affairs. They therefore determined to control his office, to make it dependent upon themselves. Codrus, the last king of Athens, is said to have sacrificed himself in a war with Peloponnesian foes, because of a prophecy that the enemies of Athens would be victorious unless the life of her king were yielded up in the contest, and it is added by the tradition that the Athenians thereupon abolished hereditary kingship by way of emphasizing their belief that no one was worthy to succeed Codrus. Possibly we are not at liberty to discredit all of the pretty story; it is such a story as

we would not discredit if we could. But we may feel assured that there were other potent reasons in the minds of the ruling men of the city why Codrus should be the last of her kings, and that they were quite clear in their determination that, if not Codrus, then some early successor of his should be the last of the hereditary monarchs of Athens.

119. **The Archonship.** — They did not, however, transform the office at once into an elective magistracy. They could not. Both unreasoning religious belief and calculating policy would have forbidden any such violent breach in the ancient order of the family-state. The kingship was put into commission. The heirs of Codrus continued to bear the title and enjoy the sacred precedence of kings for more than three hundred years; but their military powers were transferred to a *Polemarchus*, their chief civil duties to an Archon. They were no longer the real, but only the titular heads of the state. The king had been given colleagues holding office for life; and the monarchy had become a limited monarchy.

120. **Nine Archons.** — In the year 752 B.C. radical changes set in. The hereditary principle was abolished, along with tenure for life. King, polemarch, and archon were all, it was arranged, to be chosen for a term of ten years. The office of Polemarch had hitherto, there is reason to believe, like that of the King, been hereditary in a single noble family. But henceforth both king and polemarch were to be elective magistrates. Both, moreover, were to be subordinated in dignity to the archonship whose incumbents had from the first been freely chosen from the whole body of nobles. The king was still to be chosen from the royal family, the polemarch from the household which had held the office since its institution; but the archon was to be the official head of the state, and every magistracy was to be elective. Change could not stop there. Scarcely forty years went by ere it was necessary to open all three offices alike to every man of noble blood who could command the suffrages of the Council of the Areopagus. Another generation and the three offices were made annual, and a board of nine archons was instituted. Of this body, one was still chief; the old dignity still lived in the Archon *Eponymus*, from whom the year took its name in all official records. The

second archon was still Archon *Basileus*, the state's high priest and the heir of kingly functions. An Archon *Polemarchus* carried still the authority of polemarch. These three were still, no doubt, the chief officers of the public administration. But six *Thesmothetæ* were added; at first, it may be, only as scribes and secretaries to enroll decrees and keep record of the law, assistants, no doubt, to the three chief magistrates; but finally as judges with certain definite magisterial functions of their own.

All nine archons, indeed, were judges. Upon the chief archon devolved the weighty duty of determining cases of family law and inheritance; the king-archon (*Basileus*) adjudicated the then numberless cases which religious law controlled; the archon polemarch heard all cases between metics and foreigners; to the six *Thesmothetæ* fell the general oversight of the laws and the conduct of such cases as belonged to the jurisdiction of none of the three principal archons, — all cases not otherwise assigned. There were, moreover, certain judicial functions which the nine archons exercised jointly, such as the punishment of banished persons who had broken their banishment, the oversight of the balloting for certain minor judgeships, the presidency of certain meetings of the people, etc.

121. **Solon Archon Eponymus: the Crisis.** — Such was the changed magistracy of Solon's time. Solon was chosen Archon *Eponymus*, but with powers such as no archon ever regularly possessed. He was chosen at a crisis, — a crisis which by its very existence reveals a society radically unlike the society of kinship described by Homer. There are three contending parties in the state, — the men of the mountain, the men of the shore, and the men of the plain. Neither the men of the mountain nor the men of the shore would have been so much as counted in the Homeric state. They were not of the immemorial kinship at all. They were the tillers of the soil, holding their lands of the noble families who lived in and about Athens, and who constituted the third party, of the plain. They were outsiders to the state. The noble families were the state; these men of the mountain and the shore were their subjects, bearing every burden, and sharing not a single privilege. Every movement which they had made towards even a partial independence had compelled

them to borrow capital of their masters and so had clinched their slavery. The men of the shore, the men, that is, who tilled the lands which lay upon the eastern coast or stretched across the southernmost portion of the Attic peninsula to famous Sunium, and who plied a quiet trade as fishermen as well as farmers, were much better off than the goatherds of the mountain, who had both the exclusiveness of the law and the niggardliness of nature to contend with, in the mountainous districts to the north; but both hated the privileges of the Eupatrids, and were ready to combine in order to wreck them. The one could not, the other would not, any longer abide content with a lot which forbade them all independence and all hope of a voice in the determination of their own destinies. The men of the coast would have accepted moderate concessions; the poor peasants in the mountains clamored for radical measures; but both would have something done. The Eupatrids, with their submissive retainers on the plains about the city and the port, were in a numerical minority, though doubtless strongest in resource, and deemed concession unavoidable. Solon was a man of advanced age and of established reputation, alike for courage, for honesty, and for wisdom. All parties turned to him with hope and trust. He was chosen archon, invested with extraordinary legislative powers, and bidden make a constitution just to all alike. This was in the year 594 B.C.

122. **The Draconian Legislation.** — The discontent was of long standing and had already led to radical constitutional changes. Even upon the Plain, where the broad acres of the Eupatrids lay in the genial air, there was keen distress. The land was worked by tenant farmers, *Hektēmoroi*, 'Sixthers,' who undertook to live upon a *sixth part* of the produce of their farms, and yield the other five-sixths by way of rent to their masters, the owners of the soil. The austere law of the land made their very persons liable for the fulfilment of the hard agreement; if they failed in it they were sold into slavery in the markets of Egypt and Lydia.

123. But constitutions do not change for metayers; their distress simply added an item to a great sum total. It was of more immediate consequence that a body of independent peasant proprietors stood at the doors of the state moved by a deep distemper. It was hard for such men to maintain an independent

standing upon a small scale where the soil was shallow and the yield uncertain. It was time and again necessary to borrow; and to borrow money might mean, not the loss of his land merely by a delinquent borrower, should his crops fail, but the loss of his independence also. He must become a 'Sixther' and set out upon the road, it might be, to slavery at last.

124. Moreover, changes of another sort had come, which the Eupatrids could neither foresee nor prevent. Methods of warfare changed. The field was no longer to be won only by mounted knights and men in chariots. The day of the foot soldier had come, and privileged knights found themselves dependent upon the common soldier, the heavy armed *hoplite*, drawn from the ranks of those to whom political privilege had not yet been accorded. The state could not long safely depend upon men whom it drove to the wall, of whom it required everything, to whom it granted nothing. It had even become well-nigh impossible for such men to know what the law was. The Council of the Areopagus haled whom it willed before it, and could punish as it pleased any action which it chose to define as an offence against the state. The archons were at no pains to observe consistency in their judgments, and "no one could ever foresee the end of a suit." In their hands the law was both harsh and uncertain.

125. One attempt at reform had been made already. Draco had been called in a generation ago (B.C. 621) to do what Solon was now about to attempt again. Draco had not hesitated to admit to political privilege every independent yeoman who owned a yoke of oxen and could fit himself out as a *hoplite*. The archons and those who held chief command in the field, he left still to be chosen from the ranks of the wealthier nobles; but all other magistracies he threw open to the general body of citizens without distinction of rank, yeomen (*Zeugitai*) included, and some of these were to be chosen by the impartial lot. He added to the existing constitutional machinery a Council of Four Hundred and One, to be made up by lot out of the general body of citizens past thirty years of age. The principal judicial powers of the Areopagus he took away, — transferring them chiefly to the *Prytaneis*, a standing committee of the new Council, — and the elder

body was left with hardly more than authority to oversee the magistrates in the performance of their duties. The uncertain law was reduced to writing and published, that no man need doubt any more what the sentence of the law would be.

126. Such changes may well have seemed enough to create the proper forms whereby to give effect to the altered life of the state. But they did not go to the root of the matter. Draco's code had made the old laws definite and public rather than rendered them equitable. Their very definiteness may have added a touch of harshness, by making them stiffer and more inexorable than ever. And his political reforms hardly justified themselves in practice. It was one thing for a yeoman to be made eligible for office, but quite another for him to secure it, even by the lot. Nothing had been done to prevent the selling of 'Sixthers' into slavery. Yeomen (*Zeugitai*) might still grow too poor to own a yoke of oxen or equip themselves as *hoplites;* might still drop to the rank of 'Sixthers,' and come some day to see the slave pens. Something more was needed, and Solon was to undertake it.

127. **Solon's Economic Reforms.** — Solon was of Eupatrid blood, but in fortune ranked with the middle class in the state. Of a temperament at once ardent and balanced, he was suited alike by station and by inclination to hold an even hand between factions. No man doubted his honesty or his fervent patriotism; all looked to him with confidence to bring the state out of its troubles; and he certainly proceeded with courage and thoroughness. He instituted both economic and constitutional reforms, conservative enough to force no too rude or sudden break with the past, yet decisive and timely enough to assure, if they could but be observed, the future of the state. It was indispensable that economic reforms should go before constitutional changes. It was necessary to enfranchise the poor; but it was necessary to free them before enfranchising them. Solon's first step, accordingly, was to cancel all outstanding debts, set free those condemned debtors who had been retained as slaves in Attica, and clear the farms of the yeomen farmers of the mortgage pillars which stood everywhere upon them. He took these drastic measures with the less scruple because he believed the great mass of the debts thus

arbitrarily struck away to have been unrighteously, if not unlawfully, imposed, and deemed his policy in the matter for the most part one of just restitution. He recast the law of debt also, henceforth forbidding the pledging of any man's person for debt. He sought also to restrict all estates, for the future, within a certain fixed maximum, and so still further prevent the ousting of peasant proprietors.

128. From negative measures of relief Solon turned to originative measures of amelioration. Hitherto the struggling merchants of Attica had used the clumsy coins and the antiquated weights and measures of the Bœotian and Peloponnesian states, and had followed the lead of Ægina in their trade. Solon turned them toward the quicker commerce of the Ionian cities of the Ægean, by substituting the weights and coinage of the great centres of trade in Eubœa, used round about all the great circle of Hellenic cities that stretched to the farthest settlements of the bold Miletans. He took steps, too, to encourage handicrafts and diversify industry. He redistributed the incidence of taxation. The Attic population had long been divided into four property classes based upon an assessment of income. At the top of the scale stood the *pentacosiomedimni*, those wealthier Eupatrids whose incomes were not less than five hundred measures (*medimni*) of corn, oil, or wine drawn from their estates; the second class, the *Hippeis* or knights, consisted of those whose incomes were not less than three hundred measures; the third, the *Zeugitai* or yeomen, of those whose incomes did not fall below two hundred measures, — owners of oxen, men able to equip themselves as *hoplites*; the fourth, of the dependent manual laborers, the *Thetes*, standing at the bottom of the scale. Amongst the first three classes Solon sought to effect an equitable division of taxation; and they alone were to be subject to regular military service. The *Thetes* were exempt alike from taxation and from ordinary military duty.

129. Only landed property was reckoned in this classification. Probably it constituted the mass of property in Attica at that time, though there were traders in the community, and Athens had never had the contempt for commerce and the trades which so long prevailed at Sparta and Rome. Solon himself had bettered his fortunes by merchandising. He had been a merchant

before he became a statesman. It was his knowledge of the world, acquired in his travels as a merchant, indeed, which constituted a large part of his qualification for the task now assigned him. But personal property was not an important enough element in the wealth of Athenians at that day, it would seem, to be accorded political weight. The Eupatrids were, of course, the chief land-owners. Theirs was still, consequently, to be the chief part in the management of the state.

130. **Solon's Political Reforms.** — Solon also took the four property classes, to which the city had long been accustomed, as the basis for his political reforms. Every freeman of Attica who was subject to the laws was to have some part also in their administration; all were to be citizens. That he deemed an indispensable condition of order, good feeling, and efficiency in the state. But not all were to share in an equal degree. Solon was no democrat. He sought to set up, not government by the populace, but a rightly restrained government by men of wealth and position. He did not greatly depart from the model set for him by Draco, except in respect of the means which he provided for making the restraining action of the commons real and effectual in the popular assembly and the jury courts. The archons (who were to act henceforth, not separately, but as a judicial board), all stewards and farmers of the revenue, all officers of police and prisons were to be chosen exclusively from the *pentacosiomedimni*, the wealthiest class in the state. They were to be chosen, however, in part by lot. In the case of the nine archons, for example, each of the four tribes into which the people of Attica had from of old been divided was to choose ten whose names should go into the urn, and out of the forty thus nominated nine were to be picked out by lot. The other magistracies were also filled by lot, no doubt in the same manner. All minor magistracies were open to be filled from any of the three property classes.

131. **The Council.** — The Council of Four Hundred, instituted by Draco, found its suitable place in the arrangements of Solon. All citizens except those of the lowest property class were made eligible to be chosen to its membership; but here again the lot was to supply its impartial office. The Four Hundred "were to be chosen by lot from among a larger number of candidates elected

by vote by each separate tribe."[1] The term of membership was but a single year, and no man could serve a second time until the lot had fallen once upon all the other eligible men of his tribe. The functions of the Council were *pro-bouleutic*. All business to be brought before the popular assembly was first digested and prepared by the Four Hundred; without its decree, no business at all (aside from the impeachment of public officials against whom charges were preferred) could be submitted to the subordinate body. Many administrative matters the Council could itself finally dispose of. It had attained to a place of authority midway between the Assembly and the Senate of the Areopagus.

132. **The Assembly.** — To the *Ecclesia*, the general Assembly of the city, came all citizens alike, of whatever class, *Thetes* no less than *pentacosiomedimni;* and in it Solon found his appropriate organ of popular control. Here any man might bring a magistrate to book at the close of his year of office by formal impeachment. Here was the people's engine of self-defence, should need arise. The Assembly was also, no doubt, accorded the right of final decision in all questions of war or treaty. It certainly voted upon such proposals as the Council felt bound to lay before it. Its noisy democracy stood back of all the action of the state.

133. **The Heliaia.** — Little formal change was made by Solon in the duties of the archons; but he effected a very radical curtailment of their power in making their judgments in most cases subject to revision by a thoroughly democratic tribunal, the *Heliaia*. The *Heliaia* was a great jury court. Every year a large body of jurors was made up by lot from among the general body of citizens, of whatever class, any and all persons being included in the drawing who were thirty years of age and offered themselves for the service; and to this body, acting no doubt in sections, many cases of the first importance could now be taken by appeal which had hitherto lain within the exclusive jurisdiction of the archons. The archonal court thus became for the most part only a court of first instance. In the hearing of criminal cases, moreover, the *Heliaia* was often the first and only tribunal. Here was certainly a very much popularized judiciary.

134. **The Senate of the Areopagus.** — In the case of the Areopa-

[1] Gilbert (Eng. trans.), p. 137.

gus Solon showed that he meant to preserve the old as well as to advance to what was new and better. He restored to the ancient Senate substantially the same powers it had had before the legislation of Draco. It was not only to retain the power which it had all along exercised, of supervising the law and the constitution, superintending the magistrates, and preserving the public morals; it was in addition "invested with increased judicial powers, which made it again competent to inflict fines and even death upon those whom it adjudged offenders against the state. More especially cases of homicide or arson, and of attempts to overthrow the constitution, were placed under its jurisdiction."[1] Once more it had its ancient place of guidance. Its membership, as before, was each year recruited "from those outgoing archons who had held their office without blame." It was still a chief instrument of the aristocratic constitution.

135. **The New Principles introduced.** — Such was the constitution of Solon. Many as were the changes of form which it introduced, important as were the changes of principle which it effected, it was throughout wrought in a conservative spirit. It promised profound alteration, but it did not threaten rapid alteration; and it forced no revolution at all. It left the noble families in power; but it placed their authority upon a foundation of popular consent, and bounded it on its judicial side by an appeal to popular jury courts. It sanctioned wealth as a standard of political privilege, and so gave potency to a principle which would inevitably antagonize and in the end oust the idea of hereditary right; but for the present men of the old blood were the only men of wealth. It was to require still other generations of slow change and still another recasting of the laws to see privileges of blood done away with and ended.

136. **Fate of the Solonian Constitution.** — Solon's legislation no doubt pointed out the way to all subsequent successful reforms; but it satisfied no one, and for the time lived for a little only by the sufferance of its enemies. Solon had, in the eyes of the Eupatrids, done too much. They saw an end to their exclusive privileges in accepting the principles of his reforms. In the eyes of the upland herdsmen he had done too little: they had hoped

[1] Gilbert (Eng. trans.), p. 137.

to see him attempt an equalization of property. Only the peasant farmers of the shore lands saw themselves freed and aggrandized by the cancellation of mortgages, and were inclined to deem themselves well off. For ten years after his work was done Solon quitted Athens, to give factions time to cool, to escape appeals to undertake further change, to give the new order time to settle quietly into habit. "Another man," said he, "placed in my position would not have held the factions, nor reposed until he had churned the butter from the milk." But the churning went hotly on without him, and the butter was separated at last. For thirty years and more did his constitution stand, indeed, substantially unaltered; for he had at least put hope and energy into every element in the state and rendered change difficult. But hot strife filled all the time with quick recurrent troubles, and revolution became at length inevitable.

137. The chief archonship had become the principal prize of politics, and the Eupatrid factions fought bitterly for its possession, seeking by intrigue to secure it even through the uncertain lot. Twice did the office remain vacant for a whole year (590 and 586 B.C.), the struggle of parties having led to a total failure of the constitutional machinery. Once (582 B.C.) a certain Damasius defied the law and kept the office for two years, leaving it only when put out by force. Thereupon (580 B.C.) a compromise was tried: the number of archons was increased to ten; five, it was agreed, should be elected from the Eupatrids, three from the party of the rustics, two from the artisan class; and for twenty years more affairs were kept at an uneasy balance.

138. **Peisistratus.** — And then revolution came at last, through one of Solon's own kinsmen. The old factions which Solon had meant to stamp out, were too vital, too much of the very structure of the community, to be held permanently at an equilibrium by the mere sentences of the law, or even by the matching of strength with strength. The Eupatrids themselves, by their own factional divisions, supplied their opponents of the uplands and the shore with leaders out of their minority. Peisistratus, one of their own number, determined to make use of the situation to make himself master. Proclaiming himself a partisan of democracy, he drew about him the hardy men of the mountain districts

not only, but those also who were ruined by the abolition of debts and all those whose citizenship was questionable: all who were poor and all who were afraid, — whom change might help and could not injure. Solon early perceived his designs and bluntly uttered his intrepid protest against them. He was, he said, "wiser than those who could not see that Peisistratus meant to make himself tyrant, braver than those who saw it and held their tongues." But no one heeded or had force or address enough to balk the usurper; and Peisistratus got the power he coveted (560 B.C.).

139. Here was an end, it must have seemed, to all progress and to the just movement of reform; and it was infinitely sad that Solon should have lived to see and end his days amidst such scenes. But, in reality, it was probably the success of Peisistratus that kept the Solonian constitution alive for the peaceful uses of later times. Amidst the clash of factions it would probably have been trodden into the ground, to be forgotten, had not Peisistratus, willing to preserve so much of its machinery as suited his own purposes, upheld it by his own despotic power. Its forms were more popular than those of the constitution it had been meant to supersede; he was, professedly, the champion of the popular cause; it was politic that he should retain the most liberal institutions at hand. He therefore affected only to preside, with certain supreme and extraordinary powers, over the constitution set up by his uncle.

140. Peisistratus proved himself a statesman, self-possessed not only and capable of holding the mastery he had won, but a genuine friend of the people also and a wise guide in affairs. Twice he was expelled from his place of power and driven forth from the country by the factions he had ousted; but both times he returned stronger than before, — for the city found the rule of the factions impossible, and the same conditions that had induced Peisistratus' usurpation made the bulk of the citizens willing that it should be perpetuated. The old councils continued to sit; the officers of the Solonian constitution continued to be chosen, — though the uncertain lot was probably abandoned. Peisistratus himself offered to stand trial before the Areopagus upon a charge of murder and submit to the old re-

sponsibilities of citizenship. He saw to it that the small farmers of the country-side got money, when it was needed, on easy terms; he sent magistrates among them to settle disputes upon the spot and keep them away from the city courts: he exercised a dominion of influence and guidance rather than any tangible kingly power, content if men of his own blood or following found their way always into the chief offices. "His usurpation had the assent both of the nobles and the commons. The former he conciliated by social intercourse, the latter by pecuniary aid; and nature had endowed him with the arts of charming all."[1] He no doubt determined what taxes should be taken, and how the public moneys should be spent; but did all in moderation and with a purpose to serve the state; and ordinary men were fain to be content. He lived to a ripe age, and died quietly "of some infirmity, in the archonship of Philoneus (527 B.C.), thirty-three years after he first became ruler;" and so the Solonian constitution was handed on. When Peisistratus' sons, forgetting his prudence and failing to imitate his wisdom and moderation, were driven from the place of power he had established for them (511–510 B.C.), enough of Solon's work remained to serve as the basis and model for permanent reforms.

141. **Cleisthenes.** — Athens had won peace by submitting to the usurpers. Civil strife sprang up again, almost upon the instant, when they were gone, fomented by their own partisans. Isagoras, who was of the party of the expelled rulers, sought to prevent the establishment of a democratic polity, and found himself face to face with Cleisthenes, of the great clan of the Alcmaionids, time out of mind leaders in affairs, and in these latter years steadfast opponents of the party of the Peisistratids. Isagoras did not scruple to call upon Sparta, whose king was his friend, for aid, and would have put a council of three hundred, named by himself, into the place of the guiding body of the Solonian constitution, to the perpetuating of oligarchy and the jeoparding of all popular rights. But the city rose against him; and Cleisthenes was bidden complete the work Solon had begun. It was close upon fifty years since the usurpation of Peisistratus; a whole generation had

[1] Aristotle, "Const. of Athens," 16.

come and gone; the city was used to peace and desired its continuance; the power of a single family had brought all men alike to one level of privilege; and all were now ready to see a fair balance struck in affairs.

142. **New Citizens.**—Cleisthenes' first act was to broaden the basis of citizenship. Athens had begun to draw to herself of recent years not a little of the trade of the Ægean, and strangers had become numerous in her markets, setting themselves up in trade at her port and in the city itself, and identifying themselves with her life. Slaves, too, bought out of foreign markets, were generously treated in Athens, were given, indeed, so great a practical freedom that they were many of them enabled to earn independent incomes, and finally to buy their legal emancipation. Cleisthenes did not hesitate to sweep all these within the new franchise by means of which he meant to create a new democracy and generate a new spirit in affairs. He conferred citizenship upon "all free inhabitants of Attica, not only Athenians who until then had not been in possession of full citizenship, but also the strangers domiciled in Athens, and those slaves even who by emancipation had attained the standing of *metics*," or privileged denizens (see sec. 157). It was essential the old factions should be swallowed up.

143. **The Demes.**—Solon had not meant to provide a democratic constitution; Cleisthenes saw that it was necessary to do so. Nothing less would check faction or quicken the life of the country as a whole. Eupatrids must take their chances of political preferment in competition with all other citizens. Solon had reserved the chief offices for the rich, and had constituted the Senate of Four Hundred of representatives of those four tribes of immemorial origin which, being aggregations of the sacred *gentes* and *phratries* which were the strongholds of Eupatrid kinship, were themselves, in a sense, exclusive aristocratic associations. Moreover, he had left untouched the factions of the localities, had left the men of the hill country, and those of the coast hamlets contrasted with each other in point of privilege, and neither united in any common interest or enterprise with the richer landowners of the plain. The men of the plain were most of them, probably, *pentacosiomedimni* and *hippeis;* those of the

shore region were hardly more than *Zeugitai;* those of the hills were doubtless *Thetes* wholly. These several elements it was obviously Cleisthenes' task to unite, in order that the state might be single and undivided in organization. He determined, therefore, to strike at the root of the old tribal arrangements, and effect a new basis of organization altogether. It was a radical thing to do; but there was, fortunately, a conservative way to do it. Attica had from of old been divided into little districts, Demes they were called, centring in villages or hamlets throughout all the country-side. Many of these were more ancient than Athens herself, were the original sites, indeed, of independent communities, and carried memories that ran back to the first settlement of the land. We do not know how many demes there were in Cleisthenes' day, — Herodotus says one hundred; but, whatever their number, Cleisthenes united or grouped them into thirty larger districts, *trittyes.* Here was an old name, but a new thing. There had been twelve *trittyes* all along under the Solonian arrangements; but twelve was a multiple of four; a *trittys* had hitherto been a subdivision of one of the four immemorial tribes, and Cleisthenes was breaking with the organization that represented the Eupatrid supremacy. He increased the number of *trittyes,* accordingly, to thirty. Ten he formed from the demes of Athens and the plain, ten from the demes of the coast country, ten from the demes that lay within the hills.[1]

144. **The New Tribes and the Council.** — From these materials he constructed, not four, but ten new tribes out of hand, taking care, in their make-up, not to separate but to unite the three regions which had hitherto bred their distinct factions in the state. To each of the new tribes he assigned three *trittyes,* chosen by lot, one out of the plain, one lying in the hills, one upon the coast. The factions were thus stripped of their political organization, and the several parts of the country were bound together in a new union. A tribe could act henceforth only through the coöperation of men of the plain, the mountain, and the shore. The four ancient tribes continued to exist, but only as fraternal and religious organizations. They ceased to form part

[1] Gilbert, p. 146–148.

of the political structure of the state, and lost their political significance altogether. The membership of the Council which Draco had instituted and Solon had reorganized, was increased from four hundred to five hundred, fifty to be taken from each of the new tribes, and the demes to serve as electoral districts. The demes lying within Athens itself, belonged, under the new constitution, to no less than six of the tribes: the city was bound to the country, and the life of the state took on a new aspect.

145. **New Phratries.** — The plan was undoubtedly quite artificial, though the materials out of which the new tribes were made were old and familiar; but it could not well have been otherwise than artificial. Religion and its imperative prejudices forbade any dilution of the genuine Attic *gentes*, which were the core of the old tribes, by the introduction of new citizens of no birth at all. The old organizations could not be radically *popularized* without committing something very like sacrilege; and since they could not be reformed, the only thing left to do was to replace them. The way to do that was to create entirely new political materials. The new tribes, however, were given their own ecclesiastical *status* and functions. There could be no organization without its special priesthood and religious observances; the old organizations could not readily be made to open their sacred mysteries to any not of the real or adopted kin. The best thing to do, therefore, was to put aside the old gentile family unions altogether, and make up a new congeries of associations with their own worship and their own internal governments, which, if artificial at first, might be expected in time to acquire a vitality and a dignity as substantial and as lasting as those of the Eupatrid dispensation. This, accordingly, was done. The new tribes adopted eponymous heroes; the statues of their patrons were set up in the Agora, where their tribes might gather about them when assembled for consultation; and politics was asked to forget the Eupatrids.

146. At one point, moreover, Cleisthenes was able to find a place for his new citizens within even the religious organization of the old order. Though he could not force an entrance for them into the clans, with their common hearth and altar, their common burial grounds, and their common festivals, the *phratries*,

the larger religious associations into which the clans were grouped for a more public worship and ceremonial, were more like political bodies and could be recruited. He accordingly drew the new citizens together into religious societies (*"Thiasoi"*), or gave official recognition to such as he found already in existence, and either gave them a place within the old *phratries*, or formed new *phratries* to serve as their bond of union, as local circumstances dictated, seeking in all cases, so far as possible, to unite the members of each deme within one and the same *phratria*. It was thus that he completed the religious incorporation of the new order, and secured for his political arrangements an adequate sanction, as if of custom and religion.

147. **Expansion of the Popular Jury Courts.**— The next step in the popularization of the constitution was a still further extension of the jury court system. The number of Heliasts was increased, and it was provided that they, like the senators, should be chosen proportionally from the ten new tribes. Since the new tribes contained many who had never before been citizens and some who had once been slaves, this expansion of the popular jury system must, of course, have been of great consequence as a step towards democracy.

148. **Ostracism.**— As a finishing touch, Cleisthenes supplied the new democracy with an efficient means of self-defence. He was determined that no Peisistratus should use the new constitution for his own ends. He therefore completed his work by adding the law of *Ostracism*. This is a law much scorned by commentators of our own modern times, when democracies are too strong and self-possessed to fear the wiles of demagogues; it is condemned even by Aristotle; but there can be no question about its utility as a temporary expedient. Its provisions were not harsh. It provided that whenever it appeared that some one statesman was gaining such an ascendency over the people that he might, if he chose, use it unlawfully for his own advantage, as Peisistratus had done, or employ it to raise his rivalry with some opponent to a dangerous pitch of bitterness, the Assembly might call upon the people to declare their opinion as to whether any one should be temporarily banished from the state. When such a preliminary resolution was voted, no names were put in nomination. There

were no forced candidates for ostracism. The question was simply, Is there any one in Athens of whom it would be to the advantage of her peace and tranquillity to be rid for a season? Each voter made up his own ballot. If six thousand ballots contained the name of the same man, that man must leave Attica and her possessions for ten years. Six thousand votes were probably more than a third of the total vote of Athens. Although a minority, therefore, could compel the retirement of any public man, it must have required a very strong and well-grounded movement of public opinion to bring about the concerted action of six thousand voters against one man. A very evident propriety in banishing him must have existed before so many people would see it and declare it. That ostracism was not a weapon easy to use is shown by the striking infrequency of its use, and by the steady decline in its employment. It was a vital element of the constitution at first, but as that constitution gained greater and greater assurance of permanence and stability, it more and more decisively cast aside an instrument which, after all, was an instrument for the weak and not for the strong; and ostracism fell at length into utter disuse. Not, however, before it had done its appointed work. It had unquestionably given the new constitution time and assured peace in which to grow. It had afforded the people an opportunity to acquire a steady political habit and an habitual "constitutional morality" such as they might never have attained to had the rivalries of party leaders had no check placed upon them, and had political intemperateness had no punishment to fear. That it was intelligently understood, as a means of peace and not of strife, was shown by its end. It was abolished, after ninety years of occasional employment, because it had been used at last as an instrument of partisan warfare by those who could effect strong factional coalitions against opponents whose rival power had grown to inconvenient proportions.

149. **Effect of the Cleisthenian Reforms.**— The work of Cleisthenes proved definitive: he had found for the constitution a sound basis which it could keep. The only new magistrates he created, it seems, were certain *Apodectai*, receivers of revenue, through whom he effected a slight alteration in the management of the city's finances. But his establishment of ten tribes carried

with it indirectly a change in all the official structure of the state. Every administrative board was sooner or later given ten members, one to be taken from each tribe. Even the archons came to be regarded as a board of ten, the tenth member being found in the person of their official secretary. The number of *Strategoi*, general officers of the army, among the rest, was increased to ten (501 B.C.), each tribe choosing the commander of its own contingent. The *polemarch* held, still, the formal presidency in military matters; the *Strategoi* were in theory only his associates in command. In practice, however, this board of generals tended, as it turned out, to overshadow him, if not in dignity, certainly in power, and was destined afterwards to oust him, and indeed others of the nine archons, from many other duties of administration.

The relations of the *Strategoi* to one another are illustrated in an interesting way in connection with the battle of Marathon. They took turns, day by day, in the command when in the field. It was on the day of Miltiades' command that Marathon was fought, though the others are said to have yielded their commands to him on the days which preceded the battle.

150. **Local Administration.**— More important than such formal changes was the strong local rootage of the new institutions in the demes, their administrative unit. The demes had been given a real vitality: their several *demarchs* were the real instruments of the state in the local conduct of affairs. Solon had districted Attica into forty-eight *naucraries*, four within each of the old *trittyes*, to carry the burden of supplying a navy. Each *naucraria* was responsible for furnishing a single ship, and in each there was a *naucrarius* ('ship furnisher'), whose duty it was to collect the necessary taxes and take command of the ship supplied by his district, upon its completion. This older division naturally disappeared with the abolition of the old *trittyes* and tribal organizations as administrative unions. The deme took the place of the *naucraria*, and the demarch succeeded to the functions and duties of the *naucrarius*. The demarchs, appointed annually by lot, were also officers of their communes as well as officers of the state. Each was president of the assembly of his deme, and its ministerial officer in carrying out its purposes of local self-govern-

ment. It was through him that the new political life of these ancient communes in all things expressed itself.

151. **The Power of the People.** — The real character of the new constitution showed itself, however, not in the demes, but in the Assembly and in the popular jury courts. The centre of power had shifted. It lay henceforth, not in the Areopagus or the Council, but in the people's *Ecclesia* and in the people's tribunals. Events, indeed, delayed this consummation; but they also assured it. Cleisthenes' work was hardly done before sharp menace of invasion by the Persians had put a new aspect upon affairs. In 493 B.C. Mardonius came, to be frightened back by the opportune fury of stormy Athos. Three years later came the anxious decade (490–480) which began with Marathon and ended with Salamis. During the stress of such times it was impossible affairs should be guided by the people's Assembly or a numerous Council, and the Areopagus once more became the one efficient governing power in the state. For seventeen years (479–462 B.C.[?]) it ruled as it had not since the days of Draco. But it was under the stress of those very years of effort that the Persian wars had brought in their train that Athens came to her full vigor and the Athenian people to a full self-consciousness and national purpose. War brought discipline and administrative concentration; success at last brought empire: the cities of the Ægean paid tribute to Athens, as to the mistress of their league (secs. 83, 84). The result was, that the business of governing grew enormous for Athens, and the democracy learned to assert itself in affairs. It is estimated that in the time of Pericles (444–429 B.C.) no less than twenty thousand Athenians found employment in the service of the city, as soldiers, jurymen, councillors, or magistrates. Slaves toiled while citizens flung themselves into the immense undertakings of the imperial city; and the popular Assembly became the centre of the city's life.

152. **The Economic Effects of the Persian Wars.** — The Persian wars wrought important changes in the economic condition of Athens. The country had more than once been laid waste by the Persians, and such ruin had resulted to the owners of land that probably very many who had once had rank in the first of the

property classes had sunk to the last. Landed estates, the only estates hitherto reckoned in the census of wealth, had been, temporarily at least, rendered almost barren of income. Personal property gained in trade had, on the contrary, much increased, and had been in large part saved from the clutches of the invaders. Athens, in short, had become a commercial state, and because a commercial state naturally a naval state also. There unquestionably grew up among her citizens a very considerable and influential body of merchants possessed of much wealth, and yet by reason of their lack of real estate, ranking no higher than the poorest *Thetes*. We can understand the considerations, therefore, which, soon after the battle of Platæa, led Aristides to propose, and the city to consent, that eligibility to office should be based upon an assessment which should include property of all kinds (479 B.C.).

153. In 487 B.C., in the very midst of the Persian terror, the archons had once more been made subject to choice by lot, out of five hundred candidates selected in the several demes. But the *Strategoi* drew to themselves the chief magisterial functions of that troubled time, and the Areopagus the chief place of guidance. It was not until 462 that the democracy gave its rule final reality. It was then that, probably under the leadership of Ephialtes, the Assembly once for all asserted itself, stripping the Areopagus once again of its extraordinary powers, reducing its criminal jurisdiction to cases of blood-guiltiness, and itself assuming the principal rôle in the direction of affairs. In 453 Peisistratus' system of local justices, which he had used for political purposes, was resumed for administrative convenience. In order to relieve the *Heliaia* of the burden of petty cases, thirty deme judges were appointed, to go circuit among the demes, and give final judgment in all causes in which the amount in controversy was not more than ten drachmæ.

The introduction of election by lot was probably rendered comparatively innocuous by the fact that the functions of the ordinary magistracies had been greatly curtailed in importance by the institution of the popular jury courts and the concentration of administrative duties in the hands of the generals. Any man not lacking ordinary sense might now fill a magistracy without serious fault.

154. **The Reign of Pericles.** — When Pericles came to the front of affairs in Athens (444 B.C.) the constitution wore the features of a complete democracy. Not a little of the business of the state was prepared and sent down to the Assembly by the Council of Five Hundred; a few immemorial duties of supervision still lingered in the hands of the Areopagus; but the Assembly decided everything. Its decrees originated administrative measures as well as initiated policies in the field of politics. The heat, the vacillation, the dangerous ardor of the popular will played through all its action as the moment determined. It was strong when strongly led, weak when left to itself, terrible in every season of passion. The world had probably never seen before such freedom of speech and of action as characterized its stirring sessions when questions of moment pressed. It was every freeman's right to speak as he willed; cries of coarse humor or hot impatience, of raillery and of enthusiasm, broke constantly from the heady crowd; it was a school of oratory and of resource in action, and the masterful man who had won a place of confidence among the people had there his uneasy power at its full.

155. Pericles was such a master. His influence, though permanent almost beyond example in the politics of democratic states in that changeful day, rested, not upon usurpation, but upon his commanding influence with the people; and the whole of his policy was directed, by intention at least, towards the education of the people in the tasks of government and the standards of conduct which belonged to Athens as the leading state of Greece not only, but of Hellas as well. He was never archon; but almost every other post of authority fell to him that the people could give. He was *Strategus*, master of the finances, superintendent of public works; and through these offices wrought his will. It was under his inspiration that Athens was filled with the splendid monuments of art and architecture which have given a special distinction to the 'Age of Pericles.' It was at his suggestion, it is said, that the people were voted small payments for their attendance at the jury courts and the assemblies, besides a largess to enable them to attend the exhibitions in the theatre. The theatre played a large part in Pericles' plans for the education of the populace; no means were to be

neglected which might serve to quicken the judicial and political activities of the people, or strengthen Pericles in their favor.

The policy of thus paying the people to perform their duties and to be amused was, nevertheless, in the end a fatal one. So long as a Pericles dominated, all went well; but so soon as the city lost Pericles and forgot the fashion of statesmanship which he had set, much began to go ill. The majority of the citizens soon came to prefer paid service in civil offices to the necessary service in the field of battle. They were not long in becoming mere lethargic pensioners of the state.

156. **Decline of Athens.** — Such was the constitution of Athens when the calamities came which marked the close of the Peloponnesian war and the beginning of the final decline of Athenian power and independence (secs. 85–87). This time of decline, — ending with the victory of Macedonia at Chæronea in 338 B.C., — witnessed one or two temporary returns to oligarchy, and many proofs of a sad decline in political morality on the part of the people. Their pay for service and their largesses for pleasure were, of course, increased, constant depredations were made upon the rich, and the naval and military reputation of the city was given over into the keeping of mercenaries. But the Cleisthenian constitution was retained in substance to the end.

157. **The Metoici.** — Our view of Athens will be complete enough for our present purposes when we shall have noticed the non-citizen classes, — the slaves and the *metoici*. The Athenian democracy illustrated the character of all ancient democracies in confining the franchise at its widest to a body consisting of little more than half of her population. Besides her citizen population, which may be placed at one hundred and thirty thousand, she had a slave population almost as great (namely, about one hundred thousand), and a population of resident aliens (*metoici*) which was, in prosperous periods, about one-third as great (forty-five thousand). The class of *metoici* was composed principally of foreigners, among whom were Lydians, Phrygians, Syrians, and Phœnicians, as well as Greeks from other Hellenic cities, who had come to Athens to take advantage of the exceptional facilities afforded for trade in consequence of her situation and policy, though many manumitted slaves were also reckoned of their

number. It was from the ranks of the *metoici* that Cleisthenes had recruited the body of citizens, and in later times great numbers of them were often naturalized for democratic purposes. But so long as they remained *metoici* their disabilities were many. Without a special vote of permission they could not acquire property in land in Attica. They were obliged, under pain of a criminal prosecution, followed on conviction by possible slavery, to choose a patron (*Prostrates*) from among the citizens as an intermediary between them and the state. It was only through this patron that they could approach the courts to enforce their rights or in any way deal with the state. They were mulcted in taxes as if they were citizens, besides paying a special protection tax and a special fee for market privileges. They had, moreover, to suffer the mental weight of that contempt which, though less pronounced at Athens than elsewhere, all Greeks felt for foreigners. But that their disabilities were not too heavy, and that their privileges were of great moment, is abundantly proved by their numbers alike in times of peace and in seasons of war.

158. **The Athenian Slaves.** — The Athenian slaves were either barbarians taken in war or slaves bought in the slave markets of Delos, Chios, and Byzantium. The vast majority were bought slaves. They not only served as domestics, but also constituted the bulk of the agricultural laborers, miners, artisans, factory hands, overseers, and day-laborers. They also often carried on retail trade, and were sometimes superintendents of larger undertakings, money-changers, etc. Their domestic service often included private secretaryships and the like. The state itself owned slaves whom it employed as armed police, and even upon occasion as soldiers. "Further, the lower servants of the public officials — accountants, clerks, criers, bailiffs, prison attendants, executioners, and the like — were for the most part, the latter invariably, public slaves, as also the workmen in the mint."[1] Slaves and *metoici* supported, the citizens conducted, the state.

[1] Schömann, p. 352.

Greek Administration.

159. We are without detailed information with regard to the methods and machinery of administration in the Greek cities. The little of universal applicability that we can say of the conduct of the government in the smaller particulars of the every-day application and execution of the law, is of a very general sort, which does not describe exactly the administration of any one city, but gives in bare outline functions performed, doubtless, by a multiplicity of officers in the larger cities, but in the smaller cities by only a few officers saddled with a multiplicity of duties. Aristotle gives us a list of the tasks commonly considered proper to administration in Greece, and it is chiefly upon this list that we must rely for a general view of the subject. From it we learn that the governments of the Greek cities usually undertook the superintendence of trade and commerce, particularly within the city markets, the inspection of public buildings, "a police supervision over houses and streets," and the oversight of fields and forests; that they had receivers and treasurers of the public moneys, officers whose duty it was to draw up documents relating to legal business and judicial decisions, to hear complaints, and to issue warrants for the institution of legal processes, bailiffs, jailers, etc. Besides these officials, there were the officers of the naval and military administration, at whose head stood such dignitaries as the Athenian Archon *Polemarchus* or the later Athenian *Strategoi;* the functionaries whose duty it was to audit the accounts and review the proceedings of those who handled the revenues of the state; and the superintendents of the public worship, — those officers who still in most cases bore the ancient royal title, long since banished from secular politics, but retained in the religious hierarchy in memory of a kingly function too much revered by men, and thought to be too much esteemed by the gods themselves, to be exercised by any save those who bore this oldest and most hallowed of titles (sec. 120).

In states like Sparta, where civil life was a rigorous discipline, there were, of course, special officers to superintend the training of the young and the conduct of the adult of both sexes. Sparta

had, too, her public cooks to prepare the coarse diet of the *Syssitia*, and her superintendents of the public messes.

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III.

THE GOVERNMENT OF ROME.

160. **The Ancient Roman Kingdom.**— At no period before that of the Empire was the government of Rome radically unlike the governments of Greece; in their earliest stages the resemblance between Grecian and Roman governments was a resemblance of details as well as of general pattern. Homer's account of the patriarchal presidencies of Greece may serve as a sufficiently accurate picture of the primitive Roman monarchy. Kingship, it is true, was much less strictly hereditary in Rome than in Greece; the Roman kings were not only of several families, but even, tradition says, of different nationalities: and they were elected, not born, to their function. The functions of the Roman kings, however, and the government over which they presided, would have seemed most natural and regular to a contemporary Greek observer. The king was high priest of the nation, its general, and its judge. He was associated with a council,— a Senate,— composed of heads of families; for the Roman state, like the Greek, was a confederation of *gentes, curies,* and tribes; and the decisions of king and council were heard by a general assembly (*comitia*) of all the men of the curies. There is nothing in all this to call for new comment; we have seen it all in Greece (secs. 44–52),— except the method of succession to the throne. Upon the death of a king, in Rome, a council of all the fathers of the *gentes* chose an *interrex,* who was to hold office for five days; the *interrex* named a successor; the successor, taking counsel with the fathers, named a king; and the *comitia* confirmed the choice.

161. **Leading Peculiarity of Roman Constitutional Development.** — This primitive constitution completed its resemblance to those

of Greece by beginning very early to fall to pieces. But the way Rome took to alter her institutions was in some respects peculiarly Roman. The Romans never looked revolution straight in the face and acknowledged it to be revolution. They pared their constitution down, or grafted upon it, so that no change was sudden, but all alteration apparently mere normal growth, induced by thoughtful husbandry. They could always fancy that the original trunk was still standing, full of its first sap. No one was ever given leave to reconstruct the constitution like a Solon or a Cleisthenes. Reforms, however, were planted in the seed at various times which we can now see very clearly to have been the beginnings of slow changes destined to be entirely accomplished only in the fulness of time.

162. **The Reforms of Servius Tullius.** — Thus a change such as Solon brought about in Athens was set afoot in Rome by the military policy of Servius Tullius, one of the latest and greatest kings of the ancient city. It was necessary to strengthen the army, which had been drawn hitherto from the three antique tribes which made up the full citizenship of privilege within the city, a thousand from each tribe. It was impolitic to attempt to add to the number of tribes; a very jealous sense of privilege on the part of the patrician classes stood in the way of that; and yet it was not sufficient to add to the force each tribe must supply. The city had drawn to itself, as time went by, new elements of population: in addition to the patrician (the offspring of the *patres*, or fathers, of the ancient citizenship), growing numbers of 'plebeians,' outsiders attracted to the city by its commerce, besides men a great many, derived one can hardly say whence, who, because not of the old blood of the citizenship, were ranked as 'clients,' dependents upon the greater families. Above all, there was the already quite numerous body of those who had once been the free citizens of neighbor towns now conquered and incorporated within the Roman state. These non-patrician classes must be included if the full force of the state was to be put into its array; and Servius resolved to found the organization of the armed levy no longer upon the old tribes and patrician privilege, but upon the economic basis of wealth. It seemed to him wise not only to increase the public force, but also to make

a place of service, and, if might be, of privilege too, for the plebeians.

163. **The Centuries.** — He divided the people, accordingly, whether patricians or plebeians, into five property classes, to each of which he assigned military duties proportioned to its means for self-equipment for the field. From the first class were to be drawn eighteen centuries (hundreds) of horsemen and eighty centuries of footmen; from the second, third, and fourth twenty centuries each, of footmen; from the fifth thirty centuries. Those who did not have property enough to come within the classification at all were drawn upon for five centuries of mechanics, musicians, and servants. The centuries of the several classes differed in their armament and equipment. Every citizen was liable for military service from his seventeenth to his fiftieth year; but the levy was equally divided into *seniores* and *juniores:* the older men formed the city's guard, the younger made up the army destined for the field.

Having fixed the basis of wealth upon which the military levy should be made, Servius gave the new organization a territorial arrangement also, separating the city's territory into four districts, the Palatine, the Esquiline, the Suburan, and the Colline, each a district lying in part within the city, but embracing also rural areas as well. To these territorial districts he did not hesitate to give the name *Tribes.* Outside their limits the people were set apart into a number of smaller rural districts (*pagi*), to which subsequently the name *Tribes* also fell: and these as well as the Tribes of the city henceforth served as very important units in the administration of the little state's affairs.

164. **The Ancient Constitution.** — The primary object of these administrative changes was no doubt military efficiency. Servius wished to draw the whole strength of the city to its army, and all its wealth to the payment of the military tax. But a deeper purpose lay underneath, and in the end a radical constitutional change was effected. The new districts more and more became the habitual units of administration; and the host of armed centuries became a governing assembly. Until Servius thus reorganized the army, the Roman constitution had known but two authoritative bodies, the *Senate* and the *Comitia curiata.* The

Senate was the great Council of the 'Fathers,' — from each *gens* a representative. The king chose, indeed, whom he should call from each *gens* to a seat in the Senate; but custom and every force of opinion made it incumbent upon him to choose men of ripe years and men who were really leaders in their several *gentes,* and the constitution of the Senate still bore distinct traces of the old days in which it had been made up of chieftains and had served no king. The king and the Senate constituted the administration of the city-state, the people had no assembly save that of the *curies,* to which all might come, even plebeians, no doubt, as lookers on, but in which only men of patrician blood could vote, and in which there could be no voting except upon such matters as came ready from the Senate. The *curies* were the immemorial sub-divisions of the ancient tribes, for each tribe ten *curies.* Their assembly was called only to sanction the election of a king, already made by the *interrex* and the Senate; to approve radical changes of law; to vote upon treaties and declarations of war, witness such solemn legal transactions as the adoption of heirs into patrician houses, or to receive foreigners into the Roman body. Only the king or the *interrex* could summon it; it could vote only upon business prepared for it by the Senate; its vote could be only Aye or No; it was only the witnessing people, and had no initiative part in shaping the affairs of the state: king and Senate constituted the government, the king master, the Senate a council whose advice he must ask even though he should not heed it.

165. **The Comitia Centuriata.** — The Servian reforms added another assembly, and a more democratic. The centuries came together, upon the summons of the trumpet, not within the city but without its walls, upon the Campus Martius, as if for the field, with banners lifted and with arms in their hands. But they were the picked men of the city and they were drawn from all classes, plebeians as well as patricians; it was not to be expected of them as free men that they should fight without taking counsel, and Servius himself was not loath that they should have a voice in affairs. He had looked to see the plebeians enabled by this new organization to act like burgesses as well as like soldiers, and it was no doubt a thing he had foreseen that the

centuries should come in time to constitute one of the authoritative bodies of the state, a new assembly. So it turned out. They became a part of the machinery of election and legislation, as the Centuriate Assembly, the *Comitia Centuriata*, beginning very promptly to absorb important functions of many kinds, — the choice of magistrates, the decision of questions of war and peace, and the regulation of many another matter hitherto left with the elder and less democratic assembly of the *curies*. A new political power had sprung up with the reform of the army and revision of the tax roll.

166. **Beginnings of the Republic.** — The line of Roman kings came to an end, and the Republic was inaugurated at almost the very moment when Cleisthenes was effecting his popular reforms in the institutions of Athens. But it ought to be kept clearly in mind that a republic was inaugurated in Rome in 509 B.C., not in an Athenian or modern, but only in a Roman, sense. As I have said, the Romans never made revolutions out of hand; they only *grew* them, from very slowly germinating seed. The change made in 509 was scarcely greater than was the change effected in Athens some two centuries earlier by substituting annual archons for life archons. Two consuls, to be chosen annually by the *Comitia Centuriata*, were substituted for the kings, who had grown insolent in the person of Tarquin; and a newly created high priest, dubbed *Rex Sacrorum*, received the religious prerogatives of supplanted royalty, — that was all. The regal functions quietly passed to the joint exercise of the consuls, and the right of electing to the chief magistracy passed away from the *curies*, who had elected the kings. In all other respects the constitution kept close to the lines of its original forms, only the Senate receiving increase of power.

167. **The Consuls.** — That the change was slight the powers of the consuls bore abundant witness. Two consuls were chosen, and doubtless a practical division of duties was arranged between them from the first; but each consul was in fullest measure king, and master of the state. The consuls were selected by the *Comitia Centuriata*, but they received their *imperium*, their unstinted gift of kingly authority, from the *Comitia Curiata*, as the kings had received it before them. The limitation of their power

lay only in its division and in the shortness of their term of office. Each consul was supreme, and the power of the one offset that of the other. Since each could check and defeat the purposes of the other by the exercise of an absolute authority, they could act only by agreement. Neither could indulge his personal whim or safely pursue any private aim. Their term, moreover, was but for a single year. They might, indeed, being sovereign, refuse to quit their office or resign their *imperium;* no man could gainsay them while they kept it; but it was neither politic nor safe to defy their fellow burgesses in such a fashion, and once out of office they were amenable to the law.

168. Like a king, or rather like an *interrex*, a consul could name his own successor; but the *Comitia Centuriata* claimed and exercised the right to decide upon whom the choice should fall, and consuls had to content themselves with an occasional veto upon its selections. The *imperium*, moreover, had its civil side, and its military. Upon the absolute power of the consul at the head of the army and in the field the law did not venture to impose any restraint; but upon his civil power this limitation was laid, almost from the first, that with regard to every sentence he should utter in the plenitude of his power against the life or legal *status* of any citizen, an appeal should lie to the people in their assembly. His complete mastery lay in this: either consul could, with the consent of the Senate, name a *Dictator*, who for six months should be the state's absolute monarch, his *imperium* restrained in nothing, both consuls ousted for the time from their power, the state and all its resources, the lives and fortunes of its citizens, put at his disposal in all things. It was in this way a crisis might be met, if the consuls came to a deadlock, or the dangers to the state be avoided, should turmoil or insurrection or invasion threaten it.

169. **Quaestores parricidii** were early associated with the consuls, at first as their nominees, afterwards by popular election, to assume a practically independent exercise of the criminal jurisdiction included in the *imperium*, and to undertake the care of the state chest.

170. **Patrician Control.** — There was here no democratic structure of government. The patrician classes practically con-

trolled in all things. The *Comitia Curiata*, which conferred the *imperium*, was a patrician assembly. The *Comitia Centuriata*, which chose the consuls, voted by centuries; and a majority of the centuries were drawn from the patrician classes, — at any rate from those who had wealth and were in the patrician interest, — so that only patricians were chosen magistrates. Above all, the Senate, the very seat of patrician privilege, kept upon all things a hand of control which could not be shaken off. It assumed to supervise all choices of the more popular assemblies, and in the field of administration was at all times practically supreme.

171. **The Senate.** — The Roman Senate is singular among bodies of its own kind in having had no clearly defined province. From the time when consuls were first chosen till the end of the second Punic war (B.C. 509–201) it was virtually, so far as the conception of policy went, the government of Rome. Its counsels determined the whole action of the state. And yet not by any very tangible legal right. It remained till the last what it had been from the first,— only a consultative body whose advice any magistrate might ask, but whose advice no magistrate was bound to take. It was associated with the consuls as it had been with the kings,— to give them such counsel as they should call upon it to give. Its powers were, strictly speaking, powers of consent rather than of origination. It exercised *auctoritas*, the power to forbid legislation of which it did not approve, and *consilium*, the right to act, whether by way of approval or amendment, upon executive proposals. It had full control, moreover, of the public finances, having the right to determine the taxes and the manner of their collection, to vote the appropriations, and to audit the accounts of the treasury officials. It at first claimed and exercised the right to approve or disapprove, as it chose, all laws and all elections upon which the people's assemblies acted. It had a hand in all things, in periods of stress or peril setting all laws aside, and for the rest giving shape and consistency to the business of the state, and the restraint of old practice. And yet its only real authority was that of opinion. It was strong only so long as it went with the *mos majorum*.

172. Composition of the Senate. — The number of senators was, throughout most of Roman history, limited to three hundred, the complete number of *gentes* under the kings. Their tenure was for life, provided they were not deprived of their rank by the censor. In the regal period they were chosen by the king, his summons constituting them members (sec. 164); and when consuls succeeded to the kingly functions, they, like the kings, filled vacancies in the Senate. A law of about B.C. 351, however, gave the right to a seat in the Senate to every one who had been consul, prætor, or curule ædile; and vacancies over and above the number which such ex-officials sufficed to fill, were thereafter filled by appointment of the censor.

173. **Senate's Character and Influence.** — Until the comparatively late times when the Senate had been corrupted by the temptations incident to the administration of a vast empire, and had proved itself as incapable as any other advisory debating club of managing foreign conquests, it had many distinct advantages over any other authority that might have felt inclined to compete with it. Magistrates held their offices only for one year, and were generally drawn from the classes strongest in the Senate; the various assemblies of the people (secs. 165, 181, 186, 205, 206) had no permanent organization, and met only occasionally, when the proper magistrate saw fit to summon them; the Senate alone had continuous life and effective readiness for action. With its life membership it was immortal; containing the first statesmen, lawyers, and soldiers of the state, it had a knowledge of affairs and traditions of authority, of achievement, and of sustained and concerted purpose such as magistrates, who held their offices but for a twelvemonth, and meetings of the people, which came together but for a day, could not possibly have. It was compact, practised, clear of aim, resolved, confident. The vagueness of its functions was, therefore, an advantage rather than a drawback to it. It undertook every task that others seemed disposed to neglect; it stretched out its hand and appropriated every function that was lying idle. If its right to any particular function was seriously challenged, it could quietly disclaim it, — to take it up again when the challenger had passed on. The consuls and other magistrates could ignore its determinations at will, and follow their own independent purposes or the wishes of the popular assemblies. The Senate was in theory only their ser-

vant, to speak when bidden. But the Senate's advice was commonly indispensable; nowhere else were such coherent views or such informed purposes to be found; nowhere else so much experience, wealth, influence. It was too serviceable to be decisively quarrelled with: it would jeopard their own careers to defy it. In all seasons of quiet in home affairs it accordingly had its own way with undisturbed regularity.

174. **Presidency of the Senate in Constitutional Change.** — The Roman constitution was, by its own slow processes, to undergo many radical changes, but the Senate was to remain, the while, almost unchanged. New magistracies were to be created, old magistracies altered; new assemblies were to come into existence, old assemblies were to lose or change their rôles in the state; the body of the law was to experience many a transformation, but the Senate was all the while to preside, mediate, control, — the most elastic, and therefore the most durable part of the singular constitution. All the strains were to come upon it, but it could take them without serious injury, and was arbiter in all things.

175. **The Oppression of the Plebeians.** — Change came first from the just discontent of the plebeians, and came before the republic had been in operation so much as sixteen years. The kings had at least been sovereigns alike of patricians and of plebeians, masters, but not always partisans; and once and again, a king like Servius Tullius had sought to strengthen the whole state by the elevation of the plebeians to a proper place of influence. But the new government was the government of a class, and was systematic in making the most of its power, whether in the Senate or through the magistracies, for the benefit of a single order in the state. No one but a freeholder could be enrolled in a tribe and vote in the assemblies, and the patricians saw to it that the body of freeholders should not be added to. There was land enough, and that at the disposal of the state. For Rome was already steadily making conquests about her, and the conquered land became in large part *ager publicus*, subject to be allotted as the state chose. But poor men not of the privileged order were not given their share. The wealthy families who ruled in the Senate and through the magis-

tracies, themselves took up the new lands not only, — forgetting to pay the legal rent, — but even enclosed the pastures hitherto common, and left the peasant farmer neither arable land enough nor any food for his beast.

War, moreover, constantly drew the able-bodied of every class away from home, and the small farmer was only too apt upon his return to find his house burned and his fields laid waste by the enemy, and debt staring him in the face. Debt meant slavery, — slavery to some patrician to whom he must resort for money. The law of debt in Rome was as harsh and pitiless as that which Solon had undertaken to reform in Athens (secs. 127–129). A man who did not pay his debt became his creditor's prisoner and slave; and patrician magistrates were quick and inexorable in their execution of the utmost penalties. The law, moreover, was nowhere to be read or learned, save in the judgments of patrician magistrates or the warnings of patrician priests, and its execution was daily made arbitrary as well as harsh. There was no private right, — at any rate among plebeians, — to offset the terrible public power that lay in the *imperium* of the consuls. The fortunes alike of war and of politics brought nothing but loss upon the plebeian, nothing but gain, it sometimes seemed, to the patrician; and the plebeians were not slow to perceive that it was time to have done with submission.

176. **Strength of the Plebs.** — That the plebeians had long been growing to formidable numbers with the growth of the city itself there is abundant proof in the uneasy movements of politics long ere the power of the kings had reached its term. Whether or not it be true that Rome, because seated in a district which was neither fertile nor healthful enough to have been chosen for any other purpose, was at first an asylum for the outlawed and desperate characters of Italy, it is reasonably certain that her population had from the beginning a very miscellaneous, heterogeneous composition. Possibly the *gentes* which claimed to be the only *gentes* that had fathers (*patres*), and consequently the only *patricians*, were themselves of rather artificial make-up; and it is quite conceivable that those who came later into the Roman circle, although not less naturally but only more recently formed into families of the orthodox pattern, were relegated to a rank of

inferior dignity in the state, even if not excluded from a place in the *curies* alongside of the patricians, and so ranked as plebeians. There were also many who had come to Rome as aliens, content at first to live there as outsiders for the sake of certain advantages of trade to be had only on the banks of the Tiber, and who had in time given birth to a non-citizen class, which had forgotten its alien extraction and had become identified with the city, but which had made little advance beyond the threshold of the state. These, too, were plebeians. The chief part of the class, however, was derived from the conquered Latins settled in Roman territory since the times of Tullius Hostilius and Ancus Martius. By one process or another the city had become mistress of a great body of people from whom she drew no small part of her strength and her wealth, and who were yet not citizens but outsiders in every point of privilege. Servius Tullius had enrolled them in the army, made them subject to the military tax, and given them a place in the *Comitia centuriata;* and so long as the throne had stood they had found neither their burdens nor their disabilities intolerable. But now they felt full service without full privilege to be irksome beyond measure. Economic distress proved a very enlightening teacher; and they were both too numerous and too certain of their wants to hesitate to act.

177. **Secession of the Plebs** (B.C. 494). — They found their opportunity in a time of war. Returned from a field of victory over the Volscians, they remained armed and encamped outside the city's walls until their demands for protection against the savage law of debt and the pitiless rigor of the magistrates should be laid before the Senate by their commander, who agreed to be their spokesman. When the Senate refused their petition, they broke into open revolt, turned their backs upon their general, withdrew to the "Sacred Mount," which lay between the Anio and the Tiber, and declared that they would there establish an independent and rival commonwealth of their own. The Senate speedily came to its senses, opened negotiations once more, and quickly enough entered into a binding covenant which should bring the people to their allegiance again.

178. **Tribunes of the People.** — It was stipulated that land should be provided out of the public domain upon which to place

colonies of the poor farmers who had hitherto been left to starve or else accept the slavery of debt. But that was a mere measure of temporary relief. The defence of the plebeians against the tyranny of the patrician magistrates was provided for in a much more effectual manner, which had in it, as usual, the seeds of radical constitutional change. It was agreed that a new office should be created: that the plebeians, voting in their own *curies*, should elect two *tribunes* whom the law should recognize as their authoritative protectors against all magistrates, of whatever rank or power. The *tribunes* were to be invested with the right to suspend the judgment of any magistrate upon a plebeian by peremptory veto, should they regard the judgment as in any way a breach of plebeian privilege. That their persons were to be inviolable was made the subject of a special compact (the *lex sacrata*) which denounced a curse upon any one who should interfere with them in the discharge of their functions.

179. The concession seemed a small one: the tribune's right of authoritative "intercession" was meant to prevent nothing more than violations of the just privileges of any plebeian who might seek redress or resort to him for succor. But a very great authority lurked in that. The tribune was himself to judge when he should intervene, and his veto was imperative against any, even the proudest, consul. It was as if the plebeians had actually established their independent community after all, within the city instead of on the Sacred Mount, if not for action, at any rate for defence and self-protection. The power of the tribunes, moreover, grew as they used it. They were prompt to claim judicial prerogatives: the right to impose fines upon those who crossed their authority, and the right to arrest, imprison, it might be condemn, even to death, the consul himself. The law gave them no such powers, and they, of course, did not begin by exercising them; but such rights presently came to seem a natural enough inference from the powers the law did confer; it became more and more difficult to withstand the tribunes as the pretensions of the plebeians advanced from step to step in the long constitutional struggle which ensued; and a slow usurpation brought the tribunes what they wished.

180. The tribune's authority did not extend beyond a mile from the city's limits. Beyond that the *imperium* of the consul was as absolute as

ever. A tribune's intercession, moreover, could be uttered only in person: it was necessary, therefore, that a tribune should be always at hand within the city, and that the door of his house should stand unlocked day and night, in order that no man might fail of his succor when it was needed.

The name tribune was not a new one. The old patrician tribes had had each its tribune, its representative in all civil, religious, and military affairs, its magistrate and commander. The tribes formed by Servius, too, and the country districts which resulted from the alterations which he instituted, had in their turn been put under tribunes, who acted a chief part in many important matters of administration. But the tribunes of the people bore an old name with a new meaning.

181. **A New Assembly.** — Another momentous consequence of the changes thus effected showed itself in the springing up of a new assembly which the tribunes assumed the right to summon, — an assembly of exclusively plebeian make-up, a *Concilium plebis*, in which the tribunes were elected, to which appeals could be taken in the matter of the fines imposed by the tribunes, and in which counsel could be held upon any matter the plebeian magistrates chose to propound. The plebeians had long had their own tribes and *curies*. Their *curies* had, no doubt, been reckoned with those of the patricians in the *Comitia curiata* since the coming in of the Republic. But in this new body they drew apart and completed their separate organization as a distinct order in the state. It was the beginning of a new series of changes. For a time the resolutions of these assemblies bound no one but the plebeians themselves; but, as plebeian power grew, an authority which was virtually legislative accrued to their tribal council, and the balance of power in the state was definitively shifted.

182. **The Public Land.** — But these changes within the city did not settle the question of the public lands. The poor farmer was still shut in to his petty farm of an acre and a quarter, and denied his ancient right of common and of wood; patricians and their clients continued to take possession on all hands of what should have been fairly allotted amongst all; and poverty looked as inevitable a thing as ever. For twenty-seven years after the great secession to the Sacred Mount did the tribunes of the people press a persistent agitation against the unjust system, deterred neither by intimidation nor by force, seeing one man done to death under the forms of law and another assassinated outright for their bold-

ness in urging a juster way, and then (B.C. 467) obtained only a gift of lands to some of the poorer Roman farmers upon the establishment of a Latin colony at Antium. It required eleven more years of agitation to get an apportionment of building lots for the lower classes, upon the Aventine (B.C. 456); and there the matter rested for a little, other things taking precedence.

183. **The Plebeians and the Publication of the Law** (B.C. 462–451). The struggle between the orders, it turned out, was to be the moving cause of almost all legal and constitutional change. The assignment of building lots on the Aventine to men of the poorer classes had been agreed to by the Senate as a concession to stave off much graver matters, which the tribunes were pressing. Since the year 462, they had been urging the appointment of a commission, — and a commission of plebeians at that, — to codify and publish the laws, so that all men might certainly know with what privileges and under what penalties they lived. The law was known only to the patricians. Its rules and practices were a sacred tradition, mixed of religious belief and civil usage, and handed on, like a secret cult, through magistrates and priests. There could be no systematic or effectual defence of the plebeians against an arbitrary and tyrannous administration of the law so long as only the magistrate, and he the representative of a class, knew what the law was. The publication of the law was the condition precedent to any due establishment or observation of rights, at any rate for those who were not of the privileged order to which the law privately belonged.

184. **The Decemvirs** (B.C. 451–449). — For ten years the Senate fought the reasonable project, granting first an increase in the number of the tribunes, then an allotment of land on the Aventine, and finally, a limitation of the amount of the fines which a consul could impose; but the steady agitators, whom they were opposing, forced them at length to yield. It was agreed that a commission of ten should be appointed, for the usual term of a year, to codify and publish the law. All other magistracies were to be for the time suspended, in accordance with the usual Roman custom in such matters of extraordinary action, in order that the *decemvirs* should be supreme in all things until their special task should be accomplished. The plebeians, on their part, agreed to

give up the tribunate in exchange for a determinate code of law. The patricians managed to exclude plebeians from the commission, and filled it with men of their own order; but its work was undertaken and executed in good faith. Within their term they completed ten Tables of the law, which were approved by the assembly of centuries, engraved upon brazen tablets, and set up in the Forum. But that did not finish the work of codification: the year had not sufficed to complete the task. It was necessary to renew the arrangement for still another year. But the second year did not prove like the first. Appius Claudius had tasted absolute authority with a keen relish as president of the first commission, and now, a patrician turned demagogue, leagued himself with certain of the less scrupulous plebeian leaders to perpetuate his power. He obtained the selection of men of a subservient sort to be his colleagues on the second year's commission, — three of them (some say five) plebeians, — and led them, when once they were safely installed in office, to turn despots with him, in despite of law and right. When their year of office was out, they declared that their work was not done, and refused to give place to the regular magistrates of the constitution. They had, in fact, completed the two additional tables which the law had lacked; but they had not submitted them to the people, and they did not mean to govern by any law at all.

185. **Second Secession of the Plebs.**— It did not take such men long to carry things to such a pitch as to provoke rebellion. The army gathered in its camp without the city, marched thence to the Aventine, and there elected tribunes once more to be their leaders, instead of the *decemvirs*. When they saw that even then the Senate made no move to oust the *decemvirs*, they marched a second time to the Sacred Mount and again threatened to build a city there for themselves alone. They were not won back to their allegiance until the tribunate had been formally restored, the *decemvirs* brought to a reckoning, the right of appeal from all magistrates once more guaranteed, and a full amnesty accorded. Nor did change end there. Through L. Valerius Potitus and M. Horatius Barbatus, whom the Senate had commissioned to treat with them, the plebeian leaders forced the adoption of more radical measures than the mere restoration of what they had re-

signed to secure the publication of the law. Not only was the right of appeal restored: it was strengthened, and made to apply even as against a dictator. Not only was the tribunate set up again, and the inviolability of the tribunes secured by the solemn sentences of a law binding upon all classes alike, but the tribunes were given the right to attend the debates of the Senate, and began, as it turned out, before many years went by, to use their right of intercession even against its decrees. More significant still, the people were henceforth to have legislative power: the resolutions of the people were to have the binding force of law,— not the resolutions of the plebeians alone, indeed, but the resolutions of the whole body of freemen, reckoned without distinction of class, in which the plebeians were to be secure of a safe preponderance of numbers. Such were the Valerio-Horatian laws of B.C. 449.

186. **The Comitia Tributa.**— That meant the creation of a new assembly. The tribunes were still to have the right to summon *Concilia plebis*, in which the distinctive officers of their order, the tribunes, and the ædiles and judges who were their subordinates, were to be chosen, and to which appeals from the judicial decisions of these officers were still to be carried; but there was to be another assembly besides, in which the whole people was to be gathered, assembling in its tribes, and which was to be known accordingly as the *Comitia tributa*. Over its sessions a patrician magistrate was to preside. It was to elect the *quæstors* to whom the care of the city's treasury was committed. Its resolutions were to have the force of law. And so still another piece was added to the complex machinery of the singular constitution.

187. **The XII. Tables.**— The law of the XII. Tables, which came from the hands of the two decemviral commissions, contained provisions both new and old, being marked throughout by a spirit of compromise and concession. The original proposal of the plebeians that the law should be written and published had involved no avowed purpose of change; but the work as actually accomplished, though it contained the old law, showed it modified at many points. There was even distinct evidence of Greek influence, and there always lingered at Rome a very definite tradi-

tion that two years before the appointment of the first decemviral commission, an embassy had been sent to Greece to examine the famous laws of Solon at Athens, and that Hermodorus, a learned Ephesian, had returned with the ambassadors to assist at the codification.

188. The Tables borrowed the very words of the laws of Solon in some matters of detail, for example with regard to the restriction of expense at funerals, and throughout followed Greek forms in the statement of the law; but no constitutional arrangements were borrowed, and the stiff fibre of Roman practice showed itself the whole code through. Apart from such matters as the right of appeal from the decisions of magistrates, the punishment of judicial corruption by death, the prohibition of laws directed against private individuals, the assignment of criminal cases to the jurisdiction of the *Comitia centuriata*, and the regulation that magistrates, in citing resolutions of the people in justification of what they sought to do, should cite the latest and not choose as they liked among new and old, its text was given up, for the most part, to private law. Insolvent debtors were to be at the mercy of their creditors as before, but interest was not to exceed ten per cent., and usury was to be punished. The absolute power of heads of families over their households (*patria potestas*) was a little softened. Intermarriage between patricians and plebeians was forbidden, as it had always been, but a process of civil marriage was added to the once exclusive ceremonial in which the family religion of the patricians had so long been embodied. Wills, it was provided, could henceforth be made, not only by declaration in the assembly of the *curies*, as heretofore, but also by means of a form of fictitious sale. Libel and false witness were to be punished with death. It was significant, too, that voluntary associations (*collegia*), such as plebeians were wont to form, were secured in the right to make their own rules of self-government, provided only they did not transgress the law of the city. This also was a law drawn from Solon's legislation.

The XII. tables and the genesis and development of Roman law will be further and more particularly discussed in the next chapter.

189. **War and Its Constitutional Effects.** — Rome was denied the exclusively municipal life for which her forms of government

fitted her, and which was vouchsafed to Athens, Sparta, and the other cities snugly ensconced within their little valley nests among the mountains of Greece. She could not live a separate life. There were rival towns all about her on the plains of Latium, and beyond the Tiber in Etruria, which she was obliged either to conquer or submit to. When they had been brought under her supremacy, she had still only gained new hostile neighbors, to whom her territory was equally open. She seemed compelled for the sake of her own peace to conquer all of Italy. Italy subdued, she found herself separated by only a narrow strait from Sicily. Drawn into that tempting island by policy and ambition, she came face to face with the power of Carthage. In subduing Carthage she was led to occupy Spain. She had been caught in a tremendous drift of compelling fortune. Not until she had circled the Mediterranean with her conquests and had sent her armies deep into the three continents that touch its international waters, did she pause in the momentous undertaking of bringing the whole world to the feet of a single city. And her constitutional life itself felt every stroke of these conquests. This constant stress of war was of the deepest consequence to her politics, — especially in enabling the plebeians to break into the pale of political privilege much earlier than they might otherwise have done so.

190. **The Equalization of the Orders.** — During the struggle which had resulted in the establishment of the tribunate, the creation of a plebeian assembly and an assembly of tribes, and the publication and amelioration of the law in the XII. Tables, the fortunes of war had ebbed and flowed unsteadily. It was because they could not afford to have the army discontented or rebellious that the Senate had felt at every crisis the need to yield to the demands of the plebeians, who constituted so indispensable a part of its rank and file. It was because war devastated their fields and accentuated their poverty that the plebeians moved so persistently and oftentimes so turbulently for relief against the tyranny of the magistrates and for a just share in the use of the public lands. At length sixty years of struggle had brought them at least an independent corporate standing and privilege in the state and a clear law to live under.

They could act in their own assemblies, rely upon the protection of their own officers, and deem themselves a recognized party to every great transaction of politics. Moreover, within five years of the decemviral legislation they had laid the axe at the very root of the principle upon which patrician ascendency rested. In the year B.C. 445 the Senate found itself obliged to assent to a vote of the *Comitia tributa* (a *plebiscitum*, such a vote was called) that henceforth intermarriages between patricians and plebeians should be lawful. At one blow such a law struck away the pretence that religion forbade any but men of the pure and ancient blood of the city's fathers to serve in the great and intimate offices of the state or approach the gods in the taking of the auspices. The law was henceforth to know nothing of pure patrician blood.

191. **The Contest for Political Office.** — The rank and file of the plebeians, being poor men, not likely in any case to gain great place or power in the state, would have rested content with such a conclusion to their contest with the patricians, could they have got, besides, an assured economic equality in respect of the usufruct of the public domain. The richer plebeians, on the contrary, seeing themselves shut out from nothing but power, desired that above all things, and set themselves to get it. The very year the restriction upon marriage between the orders was removed (B.C. 445) they wrung from the Senate a concession which seemed to promise a great deal. Each year, it was agreed, the Senate should determine by a special vote whether the chief administration of the city should be entrusted to consuls or to a board of six military tribunes, — and, if to tribunes, plebeians were to be eligible for the office. But for nearly sixty years, though the new board was frequently put in the place of the consuls, the election of plebeians was prevented. In the year B.C. 443 a new office was created, the office of *censor*, to be open only to patricians, so fearful were the privileged order that the plebeians might make their way into the military tribuneship in spite of them. There were to be two *censors*, and they were to have charge of the numbering and enrolling of the citizens. In B.C. 441, besides, the consular right to manage the military chest was transferred to a board of four patrician *quæstors*, lest that

matter should fall into the hands of plebeian magistrates. But such precautions proved for a long time unnecessary. Not until B.C. 400 did the plebeians secure a majority upon the board of military tribunes, who were elected by the *Comitia centuriata;* and they had got three out of the four quæstorships nine years earlier (B.C. 409) in the elections held in the *Comitia tributa.* In each assembly a patrician magistrate presided. The presiding magistrate had the right to refuse to receive votes for certain candidates, and could use the power very unscrupulously for personal or partisan purposes when he dared. The Senate reserved the right to disallow elections of which it disapproved. In the last resort the priests could declare an election irregular and void, alleging some breach of religious observance or some sinister aspect of the portents. By subtlety, trick, or power, plebeians had been kept out the fifty odd years through, — war, meanwhile, constantly intruding its interruptions and drawing off the strain of internal excitements.

192. **The Licinian Laws** (B.C. 367). — The sack of the city by the Gauls (B.C. 390) interrupted the normal course of politics for a little; the lack of union among the plebeians threatened to turn it aside altogether. The poorer classes wanted only economic reforms, and were indifferent about the offices; the richer plebeians wanted political power, in addition to the social equality already won, and felt that they had economic advantage enough. The tribunes C. Licinius Stolo and L. Sextius had the statesmanship to draw the two elements of their party together to the support of a set of measures which promised to advance the claims of both. They demanded that a limit be put by law upon the amount of the public land which any one citizen could hold, in order that there might be some for all, to the breaking down of the hateful monopoly of the patrician landowners; that the number of cattle and sheep which any one owner could put upon the common pastures should also be definitely restricted; and that henceforth, instead of the makeshift of occasional boards of military tribunes, there should be consuls chosen every year, as of old, one of whom should in every case be a plebeian. For ten years the Senate stubbornly resisted (B.C. 377–367). When at last it saw itself obliged to yield, it took care (B.C. 366) to curtail

the power of the consular office still further by taking from it yet another piece. They created the office of *prætor*, and transferred to it the administration of justice, hitherto one of the chief prerogatives of the consular office, providing at the same time that none but patricians should be eligible to be chosen to the new office. Within a generation, however, the prætorship too had been won by a plebeian (B.C. 337). The dictatorship had been given to a plebeian in 356, and the censorship in 351.

193. **Subdivision of Offices.** — There had been throughout but one method of defence against the growing pretensions of the plebeians: as they approached complete access to a coveted office the importance of that office had been deliberately curtailed, by paring away its prerogatives and bestowing them upon officers newly created. But in the end this proved no defence at all. One by one, each in its turn, the new offices were filled by plebeians, until even the sacred colleges of the priesthood were no longer exclusively in patrician hands (B.C. 300, *lex Ogulnia*), and the Pontifex Maximus was himself a plebeian (B.C. 253). A second Appius Claudius (the same who made the Appian Way), as censor, enfranchised tradesmen and artisans, assisted a mere clerk of the public service to a *curule ædileship* (B.C. 304), and joined this same clerk in the publication of the legal calendar and the lists of legal *formulæ*, knowledge of which had hitherto been safely guarded confidential matter of tradition within the college of priests.

194. **Supremacy of the Senate.** — The subdivision of offices tended, singularly enough, to restore something like the original constitution of the Republic, by renewing the supremacy of the Senate. Other assemblies had multiplied and grown in function and power. By a law of the year B.C. 339 the assent of the Senate to the resolutions of the people's assembly was made a mere formality; by a law of the year B.C. 287 (the *lex Hortensia*) a like independent and binding force was given to the actions of the *concilium plebis;* and by a law of 286 the Senate was obliged to agree beforehand to confer the *imperium* upon whatever officers the *Comitia* should elect. But the very multiplicity of assemblies and the mere subdivision of functions amongst them only gave the more consequence to the great administrative council. The multiplying of offices had the same effect: business so divided needed the systematic supervision of a permanent council of state. The censors had been given the right (about B.C. 350) to

fill out the roll of the Senate upon the occurrence of vacancies in its life membership (a power which had until then belonged to the consuls), and even to remove those who seemed unworthy; but a vote of the tribes (the *lex Ovinia*) had commanded that choice be made by the censors only from among the best men of the state. This had been interpreted to mean those whom the people had chosen to occupy the higher magistracies. And so it happened that as the Senate came once more into its old functions it tended to become more exclusively than ever an assembly of ex-magistrates; and the permanent council of state to which the acting magistrates looked for guidance was made up of those seasoned to the work of government by experience. Towards such a council the acting magistrates, with their now limited powers, their minutely subdivided *imperium*, necessarily stood related, not as masters, but as servants; and a great day of power came again to the Senate. Even the tribunes became its instruments. They were, indeed, given the right at last themselves to convoke the Senate like any magistrate, and their right of intercession operated when they chose against it; but the Senate, in its turn, used the tribunes' right of intercession to check the magistrates, and their right to call together the popular assemblies to guide and influence the action of the people. The Senate's opportunity had come back again, and, now that patrician pretension was killed, the opportunity could be greatly used.

195. "The Senate alone could deal with the grave problems of war, foreign relations, and the provincial empire. The management of finance drifted naturally into its hands, for the untaxed burghers had no interest in controlling expenditure. Nor was it unworthy of its high position; the Senate was the author of Roman greatness. Superior to the House of Lords, for it was not, in theory, hereditary or exclusive, superior to the Athenian Boulé in its independence and authority, it represented at first no one class, generation, or set of principles. As it consisted mainly of ex-magistrates, it was based indirectly on popular choice. It was, in fact, the fine flower of that great aristocracy which resulted from the fusion of the orders, and concentrated in itself the experience, the traditions, and the statesmanship of Rome. Its consistent and tenacious, if narrow-minded, patriotism had saved the state and built up the fabric of empire. Its members had served an apprenticeship in arms and politics, by land and sea, in the provinces and in the forum. They were called to their places by the selection of the censors from among the chosen officers of

the Republic. Debarred from commercial pursuits (218 B.C.), restricted to the holding of land and the public service, they formed that professional governing class demanded at once by ancient political thinkers and the increasing complexity of national business."[1]

196. Though it in fact ruled, the Senate remained in theory merely an advisory body. It met upon the call of a magistrate, when its advice was wanted. The magistrate who had summoned it and who wished its advice presided over its session, and asked either for its vote upon a definite proposition, or for the individual opinions of the several senators present, calling upon them by name and in the order of their one-time official rank. While it was greatest, until the end of the Republic indeed, the Senate had neither secretary nor records. Its decisions were formulated and written out in each case by the presiding magistrate, a committee of senators assisting.

197. **The Government of Italy.** — Rome had conquered Italy and come face to face with the Carthaginian at the straits of Sicily while her republican constitution took shape and the plebeians made their way to political privilege. She held her conquests together by no constitutional system, but by such bonds of interest or of fear or of power as she could devise in each case as it arose. Each conquered town or people obtained its own terms of submission. Roman military colonies dotted the country here and there like garrisons. Roman armies moved quickly upon any threat of revolt. Senate and magistrates interfered as they pleased. All were obliged to make their contribution to the Roman treasury. But for the rest the subjugated towns and communities kept their own life and government, generally, as if they had been still independent. Rome did not send them governors, but only requisitions. Some, indeed, had been utterly reduced and brought to a condition of virtual slavery; but most were left measurably free, and some enjoyed a sort of qualified Roman citizenship. There were very few made utterly dependent. They were dependencies, but not provinces. Many stood in the honorable place of allies.

198. It grew to be a danger, indeed, and a source of menace to the state that the Italian communities had no definite place either of privilege or of subordination in the constitution. Their citizens came to be a new sort of plebeians, — a new class which was less than free, — members of the Roman State so far as burdens

[1] *A History of Rome,* by W. W. How and H. D. Leigh, p. 299.

were concerned and every sort of service, and yet not enfranchised, held off from the privileges and the power which ought to go along with the duties of membership. Their grievances, it turned out, were to be a new ferment, a new leaven of agitation, restlessness, and change.

199. **The Provinces.** — For the city's possessions outside Italy it was found necessary to devise a new system of oversight and government, — and yet not a system, either, for Rome never invented systems, but a new set of practices and accommodations. A way to control each province was found as it was needed. Rome did not plan an empire; she drifted into her world-wide sway. It was her first thought, as her conquests began to extend beyond the bounds of Italy, simply to attach the conquered states to herself by treaties of subordination or alliance or service, after the manner she had followed in Italy itself. The actual annexation and administration of foreign territories as provinces was only slowly forced upon her by circumstances. It was a policy, however, which she came more and more to relish as her ruling classes came to a full appreciation of the spoils and the power it brought them, and the erection of provinces came at length to be the rule and not the exception. A confusing variety, indeed, continued to exist in the provinces, as elsewhere, in respect of the *status* of the several communities which had been brought under her sway. Some were suffered to retain a separateness and freedom which had but slight trace of subordination in it; and there were cities not a few whose privileges expressly exempted them from the direct jurisdiction of the provincial authorities. Others retained very considerable powers of self-government, notwithstanding the fact that taxes and burdens of many kinds marked their subjection to the imperial city. Not many had, while the Republic lasted, a position of outright vassalage thrust upon them, unless they were merely barbarous or utterly recalcitrant. But everywhere Rome had her officers of provincial administration: the governor of the province, the *quæstor* who acted as his colleague in the interest of the treasury, and the publicans to whom the collection of the taxes was farmed out, besides a great retinue of the lesser officials who served these. The tendency was always towards more and more harsh exactions, greater and

greater restrictions, more and more frequent and arbitrary interference. The system was practically anything the governor chose to make it.

200. **Organization of Provincial Administration.** — "Province" meant, in the official usage of Rome, a range of power rather than a subjected district. It meant the sphere of a sovereign magistrate, and only gradually came to mean the region within which a magistrate exercised his rule. Each province had its own characteristic districts and arrangements for local self-administration, fixed upon by a committee of senators appointed for the purpose. The governor had his staff of military and civil assistants, his lieutenants, secretaries, clerks, attendants, interpreters, messengers, engineers, physicians, and priests, whose services were paid for out of the public chest; besides clients and slaves as many as he pleased, whom he took out at his own expense, — that is, at the expense of his subjects in the province. The *quæstors* who were charged with the financial administration were not his nominees like the rest, but officers elected in Rome itself and sent to the provinces instead of being kept for duty in the city.

201. It was an attempt to stretch the constitution of the city itself to cover the administration of distant possessions. At first it had been arranged, simply that there should be additional prætors chosen in Rome, some of whom should be sent to act as governors of provinces, while the rest were kept at home as usual for their accustomed administrative service. Then, when provinces multiplied, the Senate adopted the practice of extending the terms of consuls and prætors, from one year to two, and sending them for the second year to the provinces, as *pro*-consuls and *pro*-prætors. They carried with them to their new field of authority the absolute *imperium* with which they had always, in theory, been invested at home, and were restrained only by the general administrative arrangements which the Senate had fixed upon their several provinces, and by their sense of justice or of policy. Their government looked most like a system in the field of the administration of the law. In his power to punish crimes, the governor was very absolute; but in the enforcement of civil obligations very steady precedents grew up, and something like a system of law was woven out of the legal notions of

the nations, amongst whom successive Roman governors had presided.

202. **Character of Provincial Administration.** — The radical vice of the system was its irresponsibility and the spirit of plunder to which it gave leave. Each governor was expected, so cynical did opinion grow at Rome, to make his fortune in his province, and that within the single year his authority lasted. Once away from the supervision of the tribunes and the criticism of assemblies and Senate, provincial governors were absolutely irresponsible; save only that they were liable to trial for malfeasance in office, after the expiration of their terms of service, by jury-courts at Rome, which were, of course, out of sympathy with provincials and notoriously open to be bribed. In the city itself consul and prætor were theoretically independent of the conclusions of Senate or people; out of the city, commissioned as pro-consuls or pro-prætors, they were actually independent. They were city officers far away from home and from all city oversight, among subjects instead of among fellow-citizens. In Rome justice was administered by the magistrate, always subject to appeal in all cases which were not in the first instance heard in jury-courts, and well-known law governed all decisions. But in his province the pro-magistrate was a final judge restrained by no law but his own edict, issued on entering upon his provincial command, and by so much of the rules observed by his predecessor as he had chosen to adopt in that edict. And so throughout provincial administration. There being no way of collecting taxes in the province by means of any stretched municipal instrumentality, the taxes were farmed out to publicans. There being no way known to Roman municipal method of bringing local government in the provinces into any sort of systematic coöperation with the general administration, towns and districts were usually suffered to retain their own local organization, but subject to the constant harassment of Roman interference. Force cured the want of system; arrogant domination served instead of adequate machinery; a genius for intrigue and for open subjugation took the place of wise legislation. The world was made use of rather than administered.

203. **Causes of Failure.** — This attempt to make a city consti-

tution serve for the government of a whole empire failed, therefore, for the double reason that it was impossible to provide masters for the magistrates who had gone out nominally as servants of the city without giving the provincials a share in the government, and impossible to give the provincials part in a system which knew nothing of representative assemblies, and consequently nothing of citizenship save in the shape of privileges which could be exercised only in Rome itself. The provinces could not be invited to Rome to vote and sit in the assemblies and the jury-courts. And it was not citizenship in Rome that the provincials wanted, but Roman citizenship in the provinces, if such a thing could be invented, with power to curb magistrates and condemn publicans on the spot.

204. **Constitutional Tendencies.** — Within Rome herself, the admission of the plebeians to the magistracies, and the granting of practically conclusive legislative authority to the resolutions of the popular assemblies, had virtually completed the history of formal constitutional change. Henceforth, the changes which took place were not changes of form, but went on, rapidly enough, though almost unobserved, at the heart of the constitutional structure. It was the growth of the empire which was hereafter to work transformations in affairs. The Senate had charge of foreign affairs, and the people took little heed of the provinces, except when colonies were to be planted and poor men might get provided for. The spoils of conquest and dominion lifted the burden of taxation from the shoulders of the burgesses at home, and made them indifferent how the Senate managed the finances. The army grew to be a professional body, no longer a levy of farmers, and the absence of stern effort in the field added its own element to easy-going indifference at home. The city was full of those who had grown rich through the city's conquests and trade, and of those who had grown idle and lived upon the public bounty.

205. As she waxed strong, the city unwisely grew less and less liberal towards her Italian subjects, and more and more jealous to restrict political privilege to her own immediate citizens. Nominally there were four assemblies: the *Comitia centuriata*, the *Comitia curiata*, the *Comitia tributa*, and the *con-*

cilium plebis. In effect there were but two: the *Comitia centuriata*, which had come to be hardly more than an elaborate piece of electoral machinery, and the *Comitia tributa*, of which the *concilium plebis* was, in fact, a mere subdivision, hardly to be distinguished from the whole assembly of the tribes, now that the orders were at last combined. The *Comitia curiata* had now little more than a formal existence and function. The *Comitia centuriata* was presently somewhat radically reformed and popularized. It was no longer the army in assembly (secs. 162, 163, 165), for the army had long since ceased to be in fact a levy of the centuries, and it was no longer feasible to base a popular electoral organization upon it. The somewhat regular gradations of wealth which had once characterized the city, had disappeared along with the decay of the substantial middle, farmer class, which had once been the backbone of the community, and it was no longer just or convenient that the few who were rich should have as many votes as the many who were without riches. A reform was accordingly effected by combining the division by property classes with the division into tribal districts upon which the *Comitia tributa* was based. A division into five property classes was arranged within each tribe, and within each class the old division into *seniores* and *juniores*; the right to vote first in the assembly was taken away from the noble and exclusive *equites*, who still nominally supplied the horsemen of the census, and bestowed upon each occasion by lot; the basis upon which the property classification was reckoned, was made to include free capital and cash as well as land; and the old prerogatives of mere wealth and rank were largely levelled away.

206. Notwithstanding their nominal authority in all electoral and legislative matters, the assemblies were really falling off in power and influence. The *Comitia tributa* by no means retained the significance it had had while the two orders still struggled for ascendency in the state, and the *concilium plebis* no longer served as an advantageous forum for constitutional agitation. The tribunate lost by degrees its first character and old-time importance, until the tribunes had come to be, not officers of the people, but officers of the general administration merely, taken, as all other officers were, from amongst the ruling persons in the state, the

men for whom ability, or influence, or wealth opened a way into the Senate, amongst whom no distinction between patrician and plebeian was any longer to be traced, but who were none the less to be distinguished as a sort of official order, their families *par excellence* the "senatorial families" of the city. The young men of this class went through a regular course of promotion from office to office until the consulship was attained. The law presently fixed the *cursus honorum*, an established order and age of promotion (*Lex Villia Annalis*, B.C. 180); and the tribuneship was open with the rest. There was no such individual initiative in the Roman assemblies as was permitted in the assembly at Athens. Only magistrates could propose legislation. The tribunes of these later days proposed, most often, no doubt, what the Senate wished, or the official class. There were ten tribunes, and some one of them could be found upon occasion who would exercise his old power of the veto upon the action of another magistrate whom the Senate wished to check. The whole machinery of initiative and of control had passed into the hands of the Senate. It was supreme so long as, with moderate prudence, it kept an eye upon opinion; and opinion grew fitful at last and lost its weight as the population of Rome lost character and steadiness of habit.

207. **The Oligarchy.** — Such changes in the whole spirit, structure, and condition of politics produced at length what was nothing less than an oligarchy, whose distinction was not patrician blood, but wealth, social position, and a monopoly of the offices which led to the Senate. There were in the ascendency of this oligarchy, moreover, all the subtle elements of demoralization. The offices upon which its power rested were one and all electoral offices: the favor of the people had to be won in order to obtain them, the arts of the demagogue assiduously practised, or else trickery and the corrupting power of wealth had to be resorted to. The curule ædileship lay, with the rest, in the *cursus honorum*, — the office whose charge it was to exercise jurisdiction and oversight in the markets, maintain the public works of the city, and keep its ways clean, superintend the public baths, and see to the proper sanitation of the capital, and conduct the public games; and it was necessary to spend money, and favors, and services

very freely in this office in order to obtain the prætorship which lay beyond it. And yet the candidate's object was not that of the democratic but that of the aristocratic demagogue, who meant to use his power in all its higher kinds, in the prætorship and the consulship, to advance the interests of his own wealthy and self-seeking order. It was a system which surely, though slowly, bred that worst of aristocracies, a hypocritical oligarchy.

208. **Decay of the Republic.** — It was the selfish and arrogant, and in the end incapable, rule of this oligarchy that brought about the decay and permitted the collapse of the Republic, and made the establishment of the Empire inevitable. For the peoples, the interests, the dominions, the magistracies which these men sought to direct and govern were become, ere long, too varied, too complex, too disordered, too vast both for the constitutional machinery and for the political intelligence with which they sought to control them. It was necessary henceforth, if government was to be effectual, to draw together again and combine the powers of a now discordant magistracy: "(1) to restore the basis of the military and political system by revising agriculture and replacing the yeomanry on the land; (2) to provide for the relief of the poor and the police of the capital; (3) to enfranchise the Italians and develop local government; (4) to consolidate the provinces by upright rule and gradual Romanisation; (5) to reorganize the army and navy on a professional basis, with adequate checks on the action of the officers; and (6) lastly, to establish a defensible frontier, a systematic budget, and easy communication within the empire."[1] The magistrates of the city were the mere agents of a council in which personal and party interests had full play; the magistrates of the provinces had no common master whom there was any need to fear; the armies of the Republic had only a debating society to look to for control and plan of discipline; Italians found themselves hardly less provincials and subjects than the men of the provinces, whose spoils and slaves poured yearly into the city, to the demoralization of the markets and the degradation and impoverishment of the small Roman farmer. The Senate had lost its old grasp upon affairs, and had neither the inclination nor the ability to apply the only possible remedy: an

[1] How and Leigh, p. 325.

administrative centralization and reform which would have robbed it of its own ascendency.

209. **An Emperor the Remedy.**— It turned out, in the slow process of revolution which the rule of the oligarchy brought upon the city, that the only means of accomplishing the administrative changes which yearly became more and more necessary was to concentrate power in the hands of one man, at first under the forms of the old constitution, at length in open disregard of those forms,— and this was the establishment of the Empire. By making all men subjects, it practically made all men citizens. It brought Rome, indeed, very soon to the level of the provinces; but it also brought the provinces to the level of Rome by giving her and them a common master who could unify administration and oversee it with an equal interest in the prosperity of all parts of a consolidated domain. That is what Cæsar attempted, and what the overthrow of the Republic and the establishment of the Empire accomplished. Under the consuls and the Senate, the provinces had been administered as Rome's property, as the estate of the Roman people; under the emperors, who combined in their single persons consular and pro-consular, prætorian and pro-prætorian, tribunician and quæstorian powers, the provinces very soon came to be administered as integral parts of Rome. The Senate still stood, and many provincial officers were still formally elected by the people of the city; but the city became, scarcely less than the provinces, bound to perfect obedience to the emperor; provincial officers, and even city officers, were recognized as only his deputies; the Empire was unified and provincials brought to an equality with their former masters by a servitude common to all. Caracalla's act of universal enfranchisement, whatever its immediate purpose (A.D. 212), was a logical outcome of the imperial system. All were citizens where all were subjects.

210. **Genesis of the Empire.**— It is not possible to understand either the processes or the significance of the establishment of the Empire, without first understanding also the discipline of disorder and revolution by which Rome was prepared for the change from republican to imperial forms of government. The Empire was not suddenly erected. The slow and stubborn habit of the Roman, degenerate though he had become by reason of the dissipations of

conquest and the growth of a professional military spirit, would not have brooked any sudden change. That habit yielded only to influences of almost one hundred and fifty years standing. The changes which transmuted the Republic into the Empire began with the agrarian legislation of Tiberius Gracchus, B.C. 133, and can hardly be said to have been completed at the death of Augustus, A.D. 14.

211. **Tiberius Gracchus to Augustus.**— The first stages of the change which was to produce the Empire had, indeed, preceded the time of the Gracchan legislation. The strength of the Republic had lain in the body of free, well-to-do citizens, in a race of free peasants as well as of patriotic patricians, in a yeomanry of small farmers rather than in a nobility of great landholders. But the growth of the Roman dominion had radically altered all the conditions of Rome's economic life. She had not only spent the lives of her yeomen in foreign wars, but had also allowed them to be displaced at home by the accumulation of vast estates in the hands of the rich, and by the introduction of slave labor. The small farm was swallowed up in the great estates about it; the free laborer disappeared in the presence of the cheap slaves poured in upon Italy as the human spoils of foreign conquest. Presently the cheap and abundant grain of the provinces, too, rendered agriculture unprofitable in Italy, and even farming on a vast scale by means of slave labor ceased. The great estates were converted into pastures for the rearing of flocks and herds. The pressure of these changes upon the peasant classes was somewhat relieved from time to time, indeed, by the establishment of colonies in various parts of Italy upon lands acquired by conquest; but such relief was only partial and temporary. When Carthage was finally overthrown and the greater strains of war removed from Rome, the economic ruin of the home state became painfully evident, the necessity for reform painfully pressing. The poor who were also free had no means of subsistence: all the lands once owned by the state were in the hands of the rich, and with the rich rested all the substance of power, for they filled the Senate, and there made their riches tell upon public policy. The indispensable economic foundations of republicanism had crumbled utterly away.

212. It was this state of affairs that Tiberius Gracchus essayed to remedy, by reviving the Licinian laws of B.C. 367 (sec. 192), in violation of which the rich senatorial families had absorbed the public lands. By enactments which he proposed as Tribune in 133 B.C., the public lands illegally occupied were reclaimed for distribution by a retroactive enforcement of the old limitations as to the amount of public land which each person should be allowed to hold, and, although the senatorial party accomplished the murder of Tiberius and the temporary defeat of his party, his measures were in large part put into operation, in deference to the clamors and demands of the people. Ten years later, Tiberius' younger brother, Gajus Gracchus, received the tribuneship and vigorously renewed the same policy. He forced to enactment laws providing for the sale of grain at low prices to the people, for the establishment of colonies outside of Italy in the provinces, for the admission of certain classes of the citizens outside the Senate to a participation in the judicial functions then being monopolized by the senatorial oligarchs, and for a new method of bestowing provincial commands. But once more the oligarchy crushed its enemies and regained its *de facto* ascendency in the state. Slaves, besides displacing the free yeomen on the farm lands, crowded them in the city, where they were given domestic service not only, but filled also all the smaller sorts of trades and handicrafts, instructed their masters' children, acted as their masters' secretaries and confidants, and executed even the meaner sorts of public office. Freedmen were enrolled in the *census* and made their way into the assemblies, to swell the number of those who were ready to do the work of the oligarchs; and the streets of the city filled with restless mobs.

213. It was the rule of the oligarchy which produced Marius and Sulla and the cruel civil wars between the respective parties of these rival leaders. Both parties alike threw, now and again, a sop to the commons, but neither seriously undertook any reform of the evils which were sapping the state of every element of republicanism. The Italian allies went into revolt, and forced their way into the privileges of the franchise; but intrigue effected their real defeat in the struggle for substantial power, and their success did not touch the economic condition of Italy.

Sulla was able to carry reactionary legislation which turned the constitution back in some respects as far as the times of Servius and established control of the oligarchy upon a basis of definite law. The extreme policy of the oligarchs produced reaction; but reaction did not strengthen the people; it only developed factions. The time of healthful reaction had passed, and the period of destroying civil war had come. Civil war opened the doors to Cæsar and the several triumvirates, and finally Rome saw her first emperor in Octavian. The stages of the transformation are perfectly plain: there had been (1) the decay of the free peasantry and the transfer of the economic power from the many to the few; (2) the consolidation of oligarchic power in the Senate; (3) reactions and factional wars; (4) the interference of Cæsar, fresh from great successes in Gaul and backed by a devoted army; (5) the formal investiture of a single man with controlling authority in the state. Disorder and civil war had become chronic in the degenerate state, and had been cured in the only feasible way.

214. **Transmutation of Republican into Imperial Institutions under Augustus.** — But even in the final stage of the great change all appearance of radical alteration in time-honored institutions was studiously and circumspectly avoided. The imperial office was not created out of hand, but was slowly pieced together out of republican materials; and the process of its creation was presided over by Octavian, the best possible man for the function, at once a consummate actor and a consummate statesman. Of course there was and could be no concealment of the fact that predominance in the state had been given to one man; but the traditions of the Republic furnished abundant sanction for the temporary investiture of one man with supreme authority: the dictatorship had been a quite normal office in the days of the Republic's best vigor. What it was possible and prudent to conceal was, that one man had become permanent master and that republican institutions had been finally overthrown. Even the time-honored forms of the dictatorship, therefore, were avoided: the dictatorship was an office raised above the laws and rendered conspicuous in its supremacy, and had, moreover, been rendered hateful by Sulla. All that was desired was accomplished by

the use of regular republican forms. The framework of the old constitution was left standing; but new forces were made to work within it.

215. In the year B.C. 43 Octavian had formed with Antonius and Lepidus the second triumvirate and had received along with these colleagues, by decree of the people, supreme authority in that capacity for a period of five years; at the end of those five years (B.C. 38) the powers of the triumvirate were renewed for another term of the same length. This second period of the triumvirate witnessed the steady advance of Octavian in power and influence at the expense of his colleagues. His own powers survived the expiration of the five years (B.C. 33). In B.C. 31, exercising the military *imperium* conferred upon him in 32, he met and defeated Antonius at Actium, pretending to meet him, not as if he were a rival, but as if he were a leader of the revolted East; and after Actium he was supreme. But he still made no open show of any power outside the laws. The years 28 and 29 B.C. saw him consul, with his close friend Agrippa as colleague. By virtue of the censorial powers originally belonging to the consular office, and now specially conferred upon him, he effected a thorough reformation of the Senate, raising the property qualifications of its members, introducing into it fresh material from the provinces, purging it of unworthy members, and otherwise preparing it as an instrument for the accomplishment of his further purposes. In B.C. 28 he formally resigned the irregular powers which he had retained since 33 by virtue of his membership of the triumvirate, declaring the steps which he had meantime taken as triumvir illegal, and pretended to be about to retire from the active direction of affairs. Then it was that the process began which was to put the substance of an empire into the forms of the Republic.

216. In the year B.C. 27 he suffered himself to be persuaded by the senators to retain the military command for the sake of maintaining order and authority in the less settled provinces, and over these provinces he assumed a very absolute control, appointing for the administration of their affairs permanent governors who acted as his lieutenants, and himself keeping immediate command of the forces quartered in them. The other provinces, however,

remained 'senatorial,' their affairs directed by the Senate's decrees, their pro-consuls or pro-prætors appointed by the Senate, as of old. Avoiding the older titles, which might excite jealousy, Octavian consented to be called by the new title, sufficiently vague in its suggestions, of 'Augustus.' Presently, in 23 B.C. and the years immediately following, he was successively invested with tribunician, with pro-consular, and with consular powers, accepting them for life. In 19 B.C. he was formally entrusted with supervision of the laws, and in 12 B.C. he became Pontifex Maximus. His powers were at length complete. But his assumption of these powers did not mean that the old republican offices had been set aside. He was not consul, he simply had consular powers; he was not tribune, but only the possessor of tribunician powers. Consuls, tribunes, and all other officers continued to be elected by the usual assemblies as before, though, in the case of the consuls, with shortened terms. The emperor was in form only associated with them. Above all, the Senate still stood, the centre of administration, the nominal source of law, 'Augustus' sitting and voting in it like any other senator, distinguished from the rest neither in position nor in dress, demeaning himself like a man among his equals. In reality, however, he was of course dictator of every step of importance, the recognized censor upon whose will the composition of the Senate depended, the patron to whose favor senators looked for the employment which gave them honor or secured them fortune. Long life brought Augustus into the possession of an undisputed supremacy of power, in the exercise of which he was hampered not at all by the republican forms under which he forced himself to act. He even found it safe at length to surround himself with a private cabinet of advisers to whom was entrusted the first and real determination of all measures whether of administration or of legislation. The transmutation of republican into imperial institutions had been successfully effected; subsequent emperors could be open and even wanton in their exercise of authority.

217. No nation not radically deficient in a sense of humor, it would seem, could have looked upon this masquerade with perfect gravity, as the Romans did. One constantly expects in reading of it to learn of its having been suddenly broken up amidst a rude burst of laughter.

Of course the order secured by the new *régime* must have been very welcome after so long a period of civil strife and anarchy; and the men of courage and initiative who would have organized resistance or spoken open exposure of the designs of Augustus had perished in the wars and proscriptions of previous revolutions. The state wanted rest and order as France did in the days of Louis Napoleon, and lacked leaders who would have resisted the purchase of order or rest at too great a cost to liberty. Octavian had at least given a centre to the once headless system, "a chief to the civil service, a head to the army, a sovereign to the subjects, a protector to the provinces, and peace to the world." Octavian had, moreover, since Actium, been at the head of about two score veteran legions, "conscious of their strength, and of the weakness of the constitution, habituated, during twenty years of civil war, to every act of blood and violence, and passionately devoted to the house of Cæsar."[1] It might have been dangerous to laugh at the farce.

218. **The Completed Imperial Power.** — The Emperor, thus created as it were a multiple magistrate and supreme leader in all affairs of state, though nominally clothed with many distinct powers, in reality occupied an office of perfect unity of character. He was the state personified. No function either of legislative initiative or of magisterial supervision and direction was foreign to his prerogatives; he never spoke but with authority; he never wished but with power to execute. The magistrates put into the old offices by popular choice were completely dwarfed in their routine of piecemeal functions by the high-statured perfection of his power, rounded at all points and entire. Such minor powers as were needed to complete the symmetry of his office were readily granted by the pliant Senate. A citizen in dress and life and bearing, he was in reality a monarch such as the world had not seen before.

219. **The New Law-making.** — The only open breach with old republican method was effected in the matter of legislation. Even the forms of popular legislation ceased to be observed; the popular assemblies were left no function but that of election; the Senate became, in form at least, the single and supreme law-making authority of the state. The Senate was, indeed, the creature of the Emperor, senators being made or unmade at his pleasure; but it had an ancient dignity behind which the power of the

[1] Gibbon, Chap. III. (Vol. 1., p. 36, of Harper's edition, 1840).

sovereign took convenient shelter against suspicion of open revolution. Its supreme decrees, as Gibbon says, were at once dictated and obeyed. "Henceforth the emperor is virtually the sole source of law, for all the authorities quoted in the courts are embodiments of his will. As magistrate he issues *edicts* in accordance with the old usage in connection with the higher offices which he held, as did the prætors of the earlier days. When sitting judicially he gave *decrees;* he sent *mandates* to his own officials, and *rescripts* were consulted by them. He named the authorized jurists whose *responses* had weight in the nice points of law. Above all he guided the decisions of the Senate whose *Senatus consulta* took the place of the forms of the republican legislation."[1]

220. The elective prerogatives of the popular assemblies survived only the first imperial reign. During the reign of Tiberius the right to elect officers followed the legislative power, passing from the assemblies to the Senate. Singularly enough the diminished offices still open to election were much sought after as honors. Though filled for the most part with candidates named by the Emperor, they solaced the civic ambitions of many a patrician.

221. **Judicial Powers of the Senate.** — What principally contributed to maintain the dignity and importance of the Senate in the early days of the Empire was its function as a court of justice. In the performance of this function it was still vouchsafed much independence. Some belated traditions of that ancient eloquence which the Senate of the Republic had known and delighted in, but which could live only in the atmosphere of real liberty, still made themselves felt in the debate of the great cases pleaded in the patrician chamber.

222. **Growth of New Offices.** — As the imperial office grew and the constitution accommodated itself to that growth, a new official organization sprang up round about it. Præfects (*præfecti*) there had been in the earlier days, deputies commissioned to perform some special magisterial function; but now there came into existence a permanent office of Præfect of the City, and the incumbent of the office was nothing less than the Emperor's

[1] *The Early Empire* (Epochs of Ancient History series), by W. W. Capes, p. 181.

vice-regent in his absence. Prætorian cohorts were organized, under their own Præfect, as the Emperor's special body-guard. The city, too, was given a standing force of imperial police. Procurators (proctors), official stewards of the Emperor's privy purse both at home and in the provinces, though at first well regulated subordinates, came presently into very sinister prominence. And the privy council of the monarch more and more absorbed directive authority, preparing the decrees which were to go forth in the name of the Senate.

223. **The Provinces.**—But it was the provinces that gave to the Empire a life and a new organization all its own. If the Republic had proved a failure in Rome because of economic decay, and the too great strains of empire, how much greater had its failure been for the provinces! No one had so much reason to welcome the establishment of the imperial government as had the provincials; and none so well realized that there was cause for rejoicing in the event. The officials who had ruled the provinces in the name of the Republic had misgoverned, fleeced, ruined them at pleasure, and almost without responsibility; for the city democracy was a multitudinous monarch with no aptitude for vigilance. But with a single and permanent master at the seat of government the situation was very different. His financial interests were identified with the prosperity of the provinces not only, but also with the pecuniary honesty and administrative fidelity of the imperial officers throughout the Empire; with him it was success to keep his subordinates in discipline, failure to lose his grip upon them. That province might account itself fortunate, therefore, which passed from senatorial control and became an imperial province, directly under the sovereign's eye (sec. 216); but even in the senatorial provinces the Emperor's will worked for order, subordination, discipline; for regular, rigid control.

224. Under the emperors, moreover, the Senate gained a new interest in the provinces, for its membership became largely provincial. The notables of the provinces, men of prominent station, either for wealth or for political service, gained admission to the Senate. There were at last champions of the provinces within the government, as well as imperial officials everywhere

acting as the eye of the Emperor to search out maladministration, and as his mouthpieces to speak his guiding will in all things.

225. **The Empire overshadows Rome.** — In another and even more notable respect, also, the provinces were a decisive make-weight in the scale of government after the establishment of the Empire. The first five emperors (Augustus to Nero) figured as of the Julian line, the line of Cæsar, and under them the Empire was first of all Roman, — was Rome's; but for their successors, Rome, though the capital, was no longer the embodiment of the Empire. The levelling of Rome with the provinces began, indeed, with Augustus; both the personal and the municipal privileges hitherto confined for the most part to the capital city and its people were more and more widely and liberally extended to the towns and inhabitants of the provinces. Gradually the provinces loomed up for what they were, by far the greatest and most important part of the Empire, and the emperors began habitually to see their dominion as a whole. Under the successors of the Julian emperors this process was much accelerated. Presently Trajan, a Roman citizen, born, not in Italy, but in Spain, ascended the throne. Hadrian also came from a family long settled in Spain; so, too, did Marcus Aurelius. Under such men the just balance of the Empire was established; the spell was broken; the emperors ruled from Rome, but not for Rome: the Empire had dwarfed the city.

226. **Nationality of the Later Emperors.** — The later emperors, introduced during the *régime* of military revolution, were some of them not even of Roman blood. Elagabalus is said to have been a sun priest from Syria; Maximin was a Thracian peasant; Diocletian, with whom the period of military revolution may be said to have closed, and who was the reorganizer of the Empire, was born of a humble Dalmatian family. Henceforth Latin blood was to tell for little or nothing. The centre of gravity had shifted away from Rome. After the second century even the Latin language fell into decay, and Greek became the language of universal acceptance and of elegant use.

227. **The Army.** — The elevation of the provinces to their proper *status* within the Empire meant, however, most unhappily, the elevation of the provincial armies to political prominence. Very early in the history of Rome's conquests her armies

had come to be made up largely of provincial levies, and as the Empire grew the armies by which it was at once extended and held together became less and less Roman in blood, though they remained always Roman in discipline, and long remained Roman in spirit. Gauls, Germans, Scythians, men from almost every barbarian people with which Rome had come in contact, pressed or were forced into the Roman service. By the time the last days of the Republic had come, the government trembled in the presence of the vast armies which it had created. Augustus studiously cultivated the indispensable good-will of his legions. It was the prætorian guard that chose Claudius to be Emperor. Very early the principle was accepted that the Emperor was elected "by the authority of the Senate, *and the consent of the soldiers.*" Galba, Otho, and Vitellius were the creatures of the military mob in Rome. Even the great Flavian emperors came to the throne upon the nomination and support of their legions. And then, when the best days of the Empire were past, there came that dreary period of a hundred years, and more than a score of emperors, which was made so hideous by the ceaseless contests of the provincial armies, as to which should be permitted to put its favorite into the seat of the Cæsars.

228. **Changes in the System of Government.** — It was in part the violence of this disease of the body politic that suggested to the stronger emperors those changes of government which made the Empire of Constantine so different from the Empire of Augustus, and which exhibited the operation of forces which were to bring the government very near to modern patterns of absolute monarchical rule. Even before military revolutions had compelled radical alterations of structure in the government, the slow developments of the earlier periods of the Empire had created a civil service quite unlike that which had served the purposes of the Republic. Noble Romans had time out of mind been assisted in the administration of their extensive private estates and their large domestic establishments by a numerous staff of educated slaves; and it was such a domestic and private machinery which the first emperors employed to assist them in public affairs. One domestic served as treasurer, another as secretary, a third as clerk of petitions, a fourth as chamberlain. It required many a

decade of slow change to reveal to the eye of the free Roman that any honor lay in this close personal service of a sovereign master. The free Roman of the days of the Republic had served the state with alacrity and pride, but would have esteemed the service of any individual degrading: domestic association with and dependence upon a leader, even upon a military leader, had never seemed to him what it seemed to the free Teuton (secs. 291–293), a thing compatible with honor; much less could it seem to him a source of distinction. But the ministerial offices clustering about the throne and by degrees associated with great influence and power at last came to attract all ambitions. From the first, too, patricians had stood close about the person of the Emperor as his privy councillors. These councillors became the central figures of the monarch's court: they were his 'companions' (his *comites,* the word from which we get the modern title *count*). The later day when all service of the Emperor had become honorable to free men saw the name of *comites* transferred to the chief permanent functionaries of the imperial service.

229. The domestic ministerial service of the early Empire was the same in germ as that organization of stewards, chamberlains, butlers, and the rest to be found in the courts of mediæval Europe, out of which our modern ministries and cabinets have been evolved. It was to come very near to its modern development, as we shall see, under Constantine (sec. 237).

230. As the imperial system grew, offices multiplied in the provinces also. Provincial governors had at first little more than functions of presidency and superintendence. Local autonomy was by the wiser emperors for a long time very liberally encouraged. The towns of the provinces were left to their own governments, and local customs were suffered to retain their potency. But steadily the direct imperial system grew by interference, sometimes volunteered, sometimes invited. The usual itching activity took possession of the all-powerful bureaucracy which centralized government created and fostered. Provincial governors were before very long surrounded by a numerous staff of ministers; a great judicial system sprang up about them, presided over often by distinguished jurists: Roman law penetrated, with Roman jurisdiction and interference, into almost every

affair both of public and of private concern. Centralization was not long in breeding its necessary, its legitimate, hierarchy. The final fruit of the development was a civil service, an official caste, constituted and directed from the capital and regulated by a semi-military discipline.

231. **Constitutional Measures of Diocletian.** — The period of revolution and transition, the period which witnessed the mutinous ascendency of the half-barbaric soldiery of the provinces, lasted from the year 180 to the year 284. In the latter year Diocletian ascended the throne, and presently demonstrated in the changes which he introduced the constitutional alterations made necessary by that hundred years of fiery trial. All the old foundations of the constitution had disappeared. There was no longer any distinction between Romans and barbarians within the Empire: the Empire, indeed, was more barbarian than Roman; the mixed provincial armies had broken down all walls of partition between nationalities. With the accession of Diocletian the Empire emerges in its new character of a pure military despotism. The Senate and all the old republican offices have disappeared, except as shows and shadows, contributing to the pageantry, but not to the machinery, of the government. The government assumes a new vigor, but dispenses with every old-time sanction. The imperial rule, freed from old forms, has become a matter of discipline and organization merely.

232. The measures of Diocletian were experimental, but they furnished a foundation for what came afterwards from the hand of Constantine. Diocletian sought to secure order and imperial authority by dividing the command of the Empire under chiefs practically independent of each other and of him, though acting nominally under his headship. He associated Maximian with himself as co-regent, co-Augustus, with a separate court at Mediolanum (Milan), thence to rule Italy and Africa. His own court he set up at Nicomedia in Bithynia, and he retained for himself the government of the East, as well as a general overlordship as chief or senior 'Augustus.' The frontier provinces of Gaul, Britain, and Spain he entrusted to the government of a 'Cæsar,' for whom Augusta Trevirorum (Trier) in Gaul served as a capital; the control and defence of Illyricum to another

'Cæsar,' who held court at Sirmium. The two 'Cæsars' served as assistants, and posed as presumptive successors, of the two 'Augusti,' ruling the more difficult provinces, as younger and more active instruments of government. Each Augustus and each Cæsar exercised supreme military and civil authority in his own division of the Empire, though each formally acknowledged Diocletian head over all.

This system marks the abandonment of Rome as a capital and the recognition of a certain natural division between the eastern and the western halves of the Empire.

233. **Reforms of Constantine.** — This division of authority brought about, after the retirement of Diocletian, a struggle for supremacy between many rivals; but that struggle issued, fortunately, in the undisputed ascendency of Constantine, a man able to reorganize the Empire. The first purpose of Constantine was to recast the system altogether. He meant to divide administrative authority upon a very different plan, which should give him, not rivals, but servants. His first care was to separate civil from military command, and by thus splitting power control it. There was henceforth to be no all-inclusive jurisdiction save his own. For the purposes of civil administration he kept the fourfold division of the territory of the Empire suggested by the arrangements of Diocletian, placing over each 'prefecture' (for such was the name given to each of the four divisions) a Prætorian Præfect empowered to act as supreme judge, as well as supreme financial and administrative agent of the Emperor, in his special domain, as the superintendent of provincial governors, and as final adjudicator of all matters of dispute: as full vice-regent, in short, in civil affairs.

234. Under the arrangements of Diocletian each Augustus and each Cæsar had had a prætorian præfect associated with him as his lieutenant, — as successors under much altered circumstances to the title of the old-time prætorian præfect of Rome. Under Constantine there were the four præfects, but no Augusti or Cæsars placed over them, no master but Constantine himself, and possessing functions utterly dissimilar from those of the older prætorian præfect in that they were not at all military, but altogether civil.

The prætorian guards were finally abolished under Constantine. For them the play was over.

235. The four prefectures Constantine divided into thirteen 'dioceses' over which were placed vicars or vice-præfects; and these dioceses were in their turn divided into one hundred and sixteen provinces governed, a few by pro-consuls, a somewhat larger number by 'correctors,' many by 'consulars,' but most by 'presidents.'

"All the civil magistrates," says Gibbon, "were drawn from the profession of the law." Every candidate for place had first to receive five years' training in the law. After that he was ready for the official climb: employment in successive ranks of the service might bring him at last to the government of a diocese or even a prefecture.

236. Such was the civil hierarchy. Military command was vested in four Masters-General superintending thirty-five subordinate commanders in the provinces.

These subordinate commanders bore various titles; they were all without distinction dukes (*duces*, leaders); but some of them had attained to the superior dignity of counts (*comites*).

237. **The Household Offices.** — Constantine emphasized the break with the old order of things by permanently establishing his capital at Byzantium, which thereupon received the name of Constantinople, a name whose Greek form still further points the significance of the shifting of the centre of the Empire. Rome herself had, so to say, become a province, and the administration was in the Greek East. The court at Constantinople, moreover, took on the oriental magnificence, treated itself with all the seriousness in points of ceremony, with all the pomp and consideration that marked the daily life of an Eastern despotism. The household offices, created in germ in the early days of the Empire (sec. 228), had now expanded into a great hierarchy, centering in seven notable offices of state, and counting its scores and hundreds of officials of the minor sort. There was (1) the *Great Chamberlain;* (2) the *Master of Offices*, whom later days would probably have called justiciar, a magistrate set over all the immediate servants of the crown; (3) an imperial chancellor under the name, now entirely stripped of its old republican significance, of *Quæstor;* (4) a *Treasurer-General*, superintendent of some twenty-nine receivers of revenue in the provinces, overseer also of

foreign trade and certain manufactures; (5) a treasurer called *Count of the Privy Revenue* of the monarch; (6 and 7) two *Counts of the Domestics*, new prætorian præfects, commanding, the one the cavalry, the other the infantry, of the domestic troops, officers who in later times would probably have been known as constable and master of the horse.

238. We have thus almost complete in the system of government perfected by Constantine that machinery of household officers, military counts, and provincial lieutenants which was to serve as a model throughout the Middle Ages wherever empire should arise and need organization. The 'companions' (*comites*) of the Teutonic leaders held a much more honorable position than did the domestic servants of the Roman Emperor, and their dignity they transmitted to the household officers of the Teutonic kingdoms; but the organization effected by Constantine anticipated that system of government which has given us our provincial governors and our administrative cabinets.

239. **The Eastern and Western Empires; Greek and Teuton.** — The conquests within the Empire effected by the Teutonic peoples in the fifth century and the centuries immediately following cut away the West from the dominions of the Emperor at Constantinople. The division between the East and West, which Diocletian had recognized in his administrative arrangements, at length became a permanent division, not merely an administrative, but a radical political separation, and the world for a while saw two empires instead of one: a Byzantine or Greek empire with its capital at Constantinople, and a Western empire with its capital at Rome or Ravenna. When Italy fell again nominally to the Eastern Empire, in 476, she did not carry the rest of Western Europe with her. The West had fallen apart under the hands of the Germans, and was not to know even nominal unity again until the Holy Roman Empire should arise under Charles the Great (sec. 482). Meantime, however, the Eastern Empire retained in large part its integrity and vigor, as well as its administrative organization also. It was not to be totally overthrown until 1453.

240. **Religious Separation and Antagonism.** — The political separation thus brought about between the Eastern Empire and the peoples of the West was emphasized and embittered by religious differences. Chris-

tianity had been adopted by Constantine, and had practically continued to be the religion of the Eastern Empire without interruption; but the Christian doctrine of the East was not the same as the Christian doctrine of the West; the ecclesiastical party centering in the episcopate at Rome violently antagonized the doctrines received at Constantinople. The world therefore saw two churches arise, with two magnates, the Pope at Rome and the Patriarch at Constantinople, the one virtually supreme because in the West, where he was overshadowed by no imperial throne, the other dominated by a throne and therefore partially subordinate. This religious difference, accompanying as it did differences of language and tradition also, the more effectually prevented political unity and even political intercourse between the East and the West, and thus assisted in setting western Europe apart to a political development of her own.

General Summary of Ancient Politics.

241. **The City the Centre of Ancient Politics.** — We are now in a position to understand how the full-grown Greek and Roman governments, which are so perfectly intelligible to our modern understandings, were developed from those ancient family states in which we saw government begin, and of which both Greek and Roman institutions bore such clear traces, but which it is so difficult for us now to imagine as realities. It is plain, in the first place, how that municipal spirit was generated which was so indestructible a force in ancient politics. The ancient city was not merely a centre of population and industry, like the cities of the present day. If merchants and manufacturers filled its markets, that was merely an incident of the living of many people in close proximity; and the existence of the city was quite independent of the facilities it offered for the establishment of a mart. Life about a common local centre in compact social organization was a necessity to a patriarchal confederacy of families, *phratries*, and tribes. And until Roman empire had trodden out local independence, compacted provinces, and so fused the materials and marked the boundaries for nationalities; until those nationalities had been purged by the feudal system, kneaded into coherent masses by the great absolute monarchies of the Middle and Modern Ages, vivified by Renaissance and Reformation, and finally taught the national methods of the modern popular representative state, the city, the municipality, —

the compact, coöperative, free population of a small locality, — continued to breathe the only political life of which the world could boast. Politics, — the affairs of the πόλις (*polis*), the city, — divorced from municipal government was a word of death until nations learned that combination of individual participation in local affairs and representative participation in national affairs which we now call self-government. The free cities of the Middle Ages are the links through which have been transmitted to us the liberties of Greece and Rome.

242. **The Approaches to Modern Politics: Creation of the Patriarchal Presidency.** — Rome's city government, as we have seen, fell under the too tremendous weight of empire: the Greek cities went down under the destructive stress of unintermitted war among themselves and irresistible onset from Macedonia and Rome; but before they yielded to imperialism, they had come at many points very near to modern political practice. And the stages by which the approach was made are comparatively plain. It is probable, to begin with, that the governments depicted in Homer were not the first but the second form of the primitive city constitution. The king had doubtless first of all been absolute patriarchal chief of the confederated tribes, and the king's council to be seen in Homer may be taken to represent the success of an aristocratic revolution whose object it had been to put the heads of the ancient families upon a footing of equality with the king. He had thus become merely their patriarchal president.

243. **Citizenship begins to be Dissociated from Kinship.** — But this aristocracy contained the seeds of certain revolution. As dissociated chieftains the Elders had maintained at least a distinct family authority, and so preserved the integrity of each separate family organization; but as associated councillors they in a measure merged their individuality, at least their solidarity; the law of primogeniture began to be weakened, and a drift was started towards that personal individuality, as contradistinguished from corporate, family individuality, which distinguishes modern from very ancient politics. Men began to have immediate connection with the state, no longer touching it only through their family chief. Citizenship began to dissociate itself from kinship.

244. **Influence of a Non-citizen Class.** — And by the time individual citizenship had thus emerged, a population alien to the ancient kin and unknown to the politics of the ancient city was at the gates of the constitution demanding admittance. A non-citizen class, alien or native in origin, *plebs*, clients, metics, or *perioeci*, assisted to riches by enterprise in trade or by industry in the mechanic arts, or else sprung into importance as the mainstay of standing armies, demanded and gained a voice in the affairs of states which they had wearied of serving and had determined to rule.

245. **Discussion determines Institutions.** — And they brought with them the most powerful instrument of change that politics has ever known. The moment any one was admitted to political privileges because he demanded it, and not because entitled to it by blood, it was evident that the immemorial rule of citizenship had been finally overset and that thereafter discussion, a weighing of reasons and expediencies, was to be the only means of determining the forms of constitutions. Discussion is the greatest of all reformers. It rationalizes everything it touches. It robs principles of all false sanctity and throws them back upon their reasonableness. If they have no reasonableness, it ruthlessly crushes them out of existence and sets up its own conclusions in their stead. It was this great reformer that the *plebs* had brought in with them. It was to be thereafter matter for discussion who should be admitted to the franchise.

246. **Politics separated from Religion.** — The results, though oftentimes slow in coming, were momentous. Laws and institutions took on changed modes of life in this new atmosphere of discussion. The outcome was, in brief, that Politics took precedence of Religion. Law had been the child of Religion: it now became its colleague. It based its commands, not on immemorial customs, but on the common will. The principles of government received the same life. Votes superseded auguries and the consultation of oracles. Religion could not be argued; politics must be. Their provinces must, therefore, be distinguished. Government must be the ward of discussion: religion might stay with the unchanging gods.

247. **Growth of Legislation.** — Nor was this the only conse-

quence to law. Once open to being made by resolution of assemblies, it rapidly grew both in mass and in complexity. It became a multiform thing fitted to cover all the social needs of a growing and various society; and a flexible thing apt to be adjusted to changing circumstances. Evidently the legislation of modern times was not now far off or difficult of approach, should circumstances favor.

248. **Empire.** — Finally, the conquests of the Greeks under Alexander suggested, and Rome in her conquering might supplied, what had not been dreamed of in early Aryan politics, namely, wide empire, vast and yet centralized systems of administration. The first framework was put together for the organization of widespread peoples under a single government. Ancient politics were shading rapidly off into modern.

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IV.

ROMAN DOMINION AND ROMAN LAW.

249. **Currency of Roman Law.** — Roman law has entered into nearly all modern systems of jurisprudence as the major element in their structure not only, but also as a chief source of their principles and practice, having achieved perpetual dominancy over all legal conception and perpetual presidency over all legal development by reason alike of its singular perfection and its world-wide currency. It was Roman empire which gave to Roman law both its quality and its universality. The character of Roman law and the course and organization of Roman conquests are, therefore, topics which must run together.

250. **Character of Early Roman Law.** — Until Rome had gone quite far in her career of conquest Roman law was, no doubt, little more noteworthy than Greek law or early Germanic custom. In the early history of the city her law was only a body of ceremonial and semi-religious rules governing the relations of the privileged patrician *gentes* to each other and to the public magistrates. Solemn arbitration under complex symbolical forms was almost the whole of legal practice, outside private adjudications of law by family authorities. If any provision existed for securing the rights of a non-patrician, he could know what it was only by putting his case to the test of a trial; and he knew that even when that case had been brought to a successful issue no precedent had been established; it was still a secret with the privileged classes what the general rules of the law were. The proper procedure for the settlement of disputes was a state secret, from the knowledge of which the commonalty was entirely shut out. The College of Pontiffs directed these matters as they

pleased, as the sole authoritative interpreters of the law; and the pontiffs were patricians.

251. **Rome's Lay Religion.** — There was no distinction made in Rome between religion and politics. Not that there existed a "union of church and state," to use our modern phrase; there was no difference between the two. The state was bound to observe the obligations of religion, and to maintain priestly offices whose occupants should mediate between the gods and the city. A College of *Pontifices* interpreted the sacred law, arranged the ceremonial calendar, gave out the *formulæ* for suits, and preserved or adapted every ancient practice; the *Quindecemviri* kept the Sibylline books; the *Augurs* took the will of the gods from the signs of the heavens, the flight of birds, and the entrails of sacrificial beasts. But there was no sacerdotal class. The men put into these sacred offices were laymen and politicians, like any other officers of state. The *Pontifices* were a college of lawyers; their power was political, not ecclesiastical. The Roman had little sentiment in matters of religion. He deemed himself bound to a definite service of the gods; but that service could be discharged by a definite ceremonial and an exact observance of times and forms, in scrupulously respecting which he fulfilled his whole duty and was quit of further obligation. It was not unsuitable, therefore, that his lawyers should also be his priests. His worship smacked of the performance of contract, and had no savor of love or devotion about it.

252. And yet, though the priestly offices were in fact political, it was easy to make them seem more sacred than the rest, and the patricians were able to maintain their monopoly in the priestly colleges longer than anywhere else in the official make-up of the state. It was an enormous advantage, of course, to keep these offices within their class. The pontiffs alone interpreted the law and doled out its remedies; the sure dictation of prophecy rested with the priests; the augurs could postpone public assemblies, declare legislative bills out of order, hinder or permit action at will, in the interest, when they chose, of a party.

253. **Plebeian Discontent with the Law: the XII. Tables.** — In the breaking up of this selfish and narrow system, as in the modification of all political practice, the imperative discontent

of the plebeians was the chief force. They early demanded to know the law as well as to be admitted to the exercise of the magisterial power. The first step upon which they insisted was the codification and publication of existing law. Accordingly, in 451 and 450 B.C., the now celebrated XII. Tables were prepared and made public by two successive special commissions of ten, the *Decemvirs*. The first decemvirate commission consisted altogether of patricians, and is said to have prepared the first ten 'tables' of the law. The second included three plebeians and added two more tables to the code. Probably this was the first time that the legal practices of the city had been reduced to anything like systematic statement; and in being stated they must have been to a certain extent modified. Written exposition was a thing almost entirely foreign to the habit of that primitive age; both because of the limitations imposed by mental habit, therefore, and of the difficulties created by the unwilling materials with which they had to write, the sentences of the law engraved upon the copper tablets set up in the Forum must have been brief and compact. By being thus condensed the law must, moreover, have lost some of its original flexibility and have become the more rigid for being made the more certain. (See secs. 126, 183, 184.)

254. **Growth of the Law by Pontifical Interpretation.** — The codification of the law by no means took its interpretation out of the hands of the *pontifices*. The Tables did, indeed, give certainty to the general provisions of the law, but they did not impart certainty to its application to individual cases. "The structure of the provisions of the Tables was not such as to enable the plain citizen to apply them to concrete cases, or know how to claim the benefit of them, without some sort of professional advice" (Muirhead). It was necessary in each case, as before, to resort to some one who was familiar with the established interpretation; and to whom else could resort be had but to the pontiffs, the official lawyers of the state? They alone could interpret with authority as well as with knowledge. The forms of legal actions had not been made public in the Tables; and it was, after all, upon the knowledge of them that the patrician monopoly of justice chiefly rested. Not yet for two centuries and a half were

these sacred formulas to be fully published, and not until they became common property could the science of interpretation pass from the priests to the common lawyers who were without office.

255. The XII. Tables became the corner-stone of the whole structure of Roman jurisprudence. Henceforth all legal interpretation was to begin with and be built upon them. But their existence did not alter the principle of growth implanted from the first in the law of Rome. It was to grow, in the future as in the past, by interpretation in all that concerned the rights of individuals, by adjustment rather than by legislation, not by the formulation of new principles so much as by the new application of old ones. And the official source of this interpretation, so far as the meaning of the Tables themselves was concerned, was now, as before, to be the college of pontiffs. The *pontifices* had from the first been always the assessors, or professional associates, of those who administered justice. Questions of Quiritarian right went by their remits to the centumviral courts; all other questions to single lay *judices* or referees, with explicit direction how they should act, and upon what interpretation of the law. The formulation of the Tables did not interrupt this pontifical function of authoritative reference and instruction. The College "appointed one of its members every year to give 'opinions' on questions of private law," and their interpretation continued to bind every court and every *judex*.

256. They sought in their interpretations to bring everything under the letter of the law. Their 'opinions' (*responsa*) were, nevertheless, a means of development, inasmuch as they sought in their setting forth of the applications of the law to arrive at a sort of "common-law equity" which should meet the case in hand and yet not violate the strict spirit of the law. They did not hesitate to stretch the letter of a provision to cover cases not explicitly contemplated in the strict text or tradition, and so slowly brought into practice what has very happily been called "an abstract equity immersed in matter." Until the Prætors came the official *responses* of the pontiffs were the law's only internal means of growth or amelioration; and the Prætors did not come for nearly a hundred years after the making of the Tables.

257. **The Prætor.** — The office of Prætor was created in the

year 366 B.C., to take the judicial functions of the consuls (see sec. 192); because the consular office had been thrown open to the plebeians, and the patrician Senate dreaded to see any but an officer chosen out of the privileged class entrusted with the authoritative application of the law. The consuls had inherited the general and indefinite judicial powers of the kings; the Prætor received the judicial powers of the consuls. What had in their hands been one great function among many became in the hands of the Prætor the special power of a single office. Like every other officer, the Prætor possessed the *imperium* of the magistrate; with the *imperium* went always a sovereign discretion in administration. The law was henceforth to find a new soil in which to grow in the discretion of the Prætor. To him all citizens might resort for the settlement of conflicting claims. He did not himself settle the matter between them, but he laid the legal basis for its settlement. Having heard their statement of their case, he sent it for decision, according to old custom, to some private citizen whom he nominated *judex*, or arbitrator, for the occasion, accompanying his reference of the case with instructions to the arbitrator in which he not only set forth the question at issue, but also formulated the law to which the decision must conform. Very many cases were referred thus each to a single *judex;* in many instances, again, they were sent to a number of *judices* who constituted a sort of board or jury to look into the merits of the controversy. Always, however, Prætor and *judices* stood towards each other in much the same relation that the judge and jury of our own system hold towards one another: except that the Prætor and *judices* did not sit together and hear cases at the same time. They acted separately and at different times. But the Prætor interpreted the law, and the *judices* passed upon the facts.

258. **The Law and the Prætor's Application of it.** — The law which the Prætor had to expound and apply in the *formulæ* or briefs which he sent down to the *judices*, as at once their warrant and their instructions, was not a law constantly advanced and adjusted by legislation. It was, for the most part, only the XII. Tables, a small body of *Senatus-consulta*, or senatorial decrees, and a few legal principles introduced by popular agitation during

the long struggle of the plebeians for political privilege. Of formal law-making such as we are nowadays accustomed to look for there was almost none to help him. He himself, therefore, became to all intents and purposes a legislator. The growth of the city, and the constant changes of circumstance and occasion for the use of his law functions which must have attended its growth, of course gave rise to cases without number which the simple, laconic laws of the early time could not possibly have contemplated. To these, however, the Prætor had to apply, with what ingenuity or originality he possessed, such general rules and conceptions as he could discover in the ancient codes or devise for modern practice; and of course so great a development of interpretation insensibly gave birth to new principles. The Prætor, consciously or unconsciously, became a source of law.

259. **Prætor** *vs.* **Pontiff.** — Here was an officer sure to prove a very formidable rival to the college of pontiffs in giving shape to the law. The pontiffs were no less than before the official interpreters of code and ceremonial. Their *responses* were still the only authoritative 'opinions': they were not to lose their legal place in the singular system of the complex state until the Republic itself came to an end. But the Prætor's discretion in shaping remedies to meet wrongs, in the adoption of a new procedure, smacking of new principles, to meet new cases, none the less made strides towards usurping their place of guidance. Plebeians were admitted to the prætorian office in 337 B.C., not thirty years after its creation, and a full generation before a plebeian found his way into the pontifical college; and the change was not likely to slacken the Prætor's energy in drawing to himself a masterful control in the administration of the law. The Prætor's 'equity,' moreover, had a natural advantage over the interpretation of a strict law to which the pontiffs were shut in. He could find new principles and they could not. The future was for him.

260. **The Prætor's Edict.** — At the beginning of his year of office the Prætor published an Edict in which he formally accepted the principles acted on by his predecessors, and announced such new rules of adjudication as he intended to adopt during his year of authority. These new rules were always, in form at least,

rules of procedure. The Prætor announced, for example, that he would, hereafter, regard property held by certain methods, hitherto considered irregular or invalid, as if it were held according to due and immemorial form, and would consider the title acquired valid for all practical purposes. He did not assume to make such titles valid: that would be to change the law. But he could promise in adjudicating cases to treat them *as if they were* valid, and so practically cure their defects. In a word, he could not create rights; but he could create and withhold *remedies.* It was thus that through successive edicts the law attained an immense growth. And such growth was, of course, of the most normal and natural character. By such slow, conservative, practical, day to day adjustments of practice the law was made easily to fit the varying and diversified needs of a growing and progressive people.

261. **A Prætor Peregrinus.** — A little more than one hundred years went by, and then it was necessary to appoint an additional Prætor, a Prætor *peregrinus* (" *Prætor qui jus dicit inter peregrinos* " was his full descriptive title), a Prætor for the foreigners or aliens who more and more multiplied in the city, to the quickening of its trade and to the extension of its life and power. It was presently necessary to distinguish the Prætor of the older, undivided office as the Prætor *urbanus,* the City Prætor, the Prætor for citizens. The functions of the Prætor *peregrinus* were similar to those of the City Prætor, but much less limited by the prescriptions of old law. He administered justice between resident foreigners in Rome itself, between Roman citizens and foreigners, and between citizens of different cities within the Roman dominion. Roman law, — the *jus civile,* the law administered and developed by the Prætor *urbanus,* — was only for Romans. Its origins and fundamental conceptions marked it as based upon tribal customs and upon religious sanctions which could only apply to those who shared the Roman tradition and worship. It could not apply even as between a Roman and an alien. The Latin and Italian towns which Rome brought under her dominion were, therefore, suffered to retain their own law and judicial practices for their own residents, so far at least as their retention offered no contradiction to Rome's policy or authority; but the

law of one town was of course inapplicable to the citizens of any other, and therefore could not be used in cases between citizens of different towns. In all such cases, when Roman law could not be appealed to, the Prætor *peregrinus* was called upon to declare what principles should be observed.

262. **The Jus Gentium.** — The first incumbents of this delicate and difficult office, of Prætor *peregrinus*, were doubtless arbitrary enough in their judgments, deciding according to any rough general criteria of right or wrong, or any partial analogies to similar cases under Roman law that happened to suggest themselves. But they seem, nevertheless, to have had a sincere purpose to be just, and at length the Roman habit of being systematic enabled them to hit upon certain useful, and as it turned out, momentous, general principles. They of course had every opportunity for a close observation and wide comparison of the legal practices and principles obtaining among the subject nations among whom their duties lay, and they presently discerned certain substantial correspondences of conception among these on many points frequently to be decided. With their practical turn for system, they availed themselves of these common conceptions of justice as the basis of their adjudications. They sought more and more to find in each case some common standing-ground for the litigants in some legal doctrine acknowledged among the people of both. As these general principles of universal acceptance multiplied, and began to take systematic form under the cumulative practice of successive Prætors, the resultant body of law came to be known among the Romans as the *jus gentium*, the law of the nations, — the law, that is, common to the nations among whose members Roman magistrates had to administer justice.

263. **The Jus Gentium not International Law.** — This body of law had, of course, nothing in common with what we now call the Law of Nations, that is, International Law. International law relates to the dealings of nation with nation, and is in largest part *public* law — the law of state, of political, action (secs. 1457, 1458). The *jus gentium*, on the other hand, was only a body of *private* and commercial law, chiefly the latter. It had nothing to do with state action, but concerned itself exclusively with the relations of individuals to each other among the races subject to

Rome. Rome decided political policy, her Foreign Prætor decided only private rights.

264. **Influence of the Jus Gentium upon the Jus Civile.** — But the *jus gentium* attained an influence of great importance, even over the development of Roman law itself. Its principles, partaking of no local features or special ideas produced only by the peculiar history or circumstances of a single people, but made up of apparently universal judgments as to right and wrong, justice and injustice, seemed to be entitled to be considered statements of absolute, abstract equity. As they became perfected by application and studious adaptations to the needs of a various administration of justice, it became more and more evident that the *jus civile*, the exclusive law under which the Roman lived, was arbitrary and illiberal by comparison. The Prætor *peregrinus* began to set lessons for the Prætor *urbanus*. The *jus civile* began to borrow from the *jus gentium;* and as time advanced, it more and more approximated to it, until at last it became completely liberalized by its example.

265. **Completion of the Prætor's Power.** — The *jus gentium* was not foreign law: it became Roman law by adoption at the hands of the Prætor. It was "that part of the private law of Rome which was essentially in accordance with the private law of other nations." It became positive law so soon as it found application in the courts of the city magistrates, binding Romans themselves no less than did the *jus civile*, which was based upon custom and statute. It was simply the *jus æquum* as contradistinguished from the *jus strictum*. It found its recognition and its way into use through the Prætor's 'formulas,' the authoritative instructions with which the Prætor assigned cases for decision to a *judex;* and it found at last as free an entrance through the 'formulas' of the Prætor *urbanus* as through those of the Prætor *peregrinus*.

266. The Prætor *peregrinus* was probably the first to adopt and develop the formulary procedure; for in his court the forms of action recognized in the Tables applied only when both of the litigants possessed full *jus commercii*, a standing to which Rome was slow to admit her closest allies. But the real introduction of the procedure into the body of Roman law proper of course

took place at the hands of the Prætor *urbanus*, in those cases arising between Roman citizens themselves to which the *jus strictum* could not be made to apply. 'Formulas' were admissible only where a *judex* was appointed and instructed *de novo;* they could not be used in cases which went to the centumviral court or in cases which the magistrate himself decided without reference, by some summary process.

267. So free a procedure tended not only to supplement but also to supplant the too inflexible and unamendable actions of the old law, and really infringed upon the *jus strictum* in the most direct manner. A sharp and final issue was joined, consequently, between the *jus prætorium* of the Prætor *urbanus* and the *interpretation* of the college of pontiffs, which in the end only legislation could decide. In the year 150 B.C., legislation decided it. By the *Lex Æbutia* it was in that year enacted that the formulary procedure might be employed by Roman citizens in all cases set up in the court of the Prætor *urbanus*, even in those for which the old law had provided; and that notwithstanding the fact that by that time plebeians had long since made their way into the office of Pontifex Maximus and had offered public instruction to all comers in the mysteries of the old procedure, and that the old formulas of the *jus strictum* had been published and a commentary written upon them, which had made them no less the property of laymen than of priests. The Prætor's direct and simple forms suited a growing and hurrying life; the others were outgrown and discredited. The early years of the Empire saw the use of the old forms actually forbidden by statute.

268. **Administration of Justice in the Provinces.** — The authority of the Foreign Prætor did not extend beyond Italy, beyond the city's immediate dependencies. In the 'Provinces' proper the governors exercised the functions of Prætor *peregrinus*. The towns of the provinces, like the towns of Italy, were for long left with their own municipal organization and their own systems of judicature. But between the citizens of different districts of a province there were cases constantly arising which had to be brought before the governor as judge. Whether as pro-consul therefore, or as pro-prætor, or under whatever title, the

governor was invested with prætorial functions, as well as with military command and civil supremacy. It was with principles of judicial administration that the governor's edict, issued on entering upon office, was largely concerned. Here was another and still larger field for the growth of the *jus gentium*, — an almost unlimited source of suggestion to Roman lawyers.

269. **The Law of Nature.** — As Rome's conquest grew and her law expanded she did not fail to breed great philosophical lawyers who saw the full significance and importance of the *jus gentium* and consciously borrowed from it liberal ways of interpretation. And they were assisted at just the right moment by the philosophy of the Greek Stoics. The philosophy of the Stoics was in the ascendency in Greece when Rome first placed her own mind under the influence of her subtile subjects in Attica and the Peloponnesus: and that philosophy was of just the sort to commend itself to the Roman. Its doctrines of virtue and courage and devotion seemed made for his practical acceptance: its exaltation of reason was perfectly congenial to his native habit. But its contribution to the thought of the Roman lawyer was its most noteworthy product in Rome.

270. The Stoics, like most of the previous schools of philosophers in Greece, sought to reduce the operations of nature both in human thought and in the physical universe to some simple formula, some one principle of force or action, which they could recognize as the Law of Nature. They sought to square human thought with such abstract standards of reason as might seem to represent the methods or inspirations of Universal Reason, the Reason inherent, indwelling in Nature. In the mind of the Roman lawyer this conception of a Law of Nature connected itself with the general principles of the *jus gentium*, and served greatly to illuminate them. Probably, it seemed, these conceptions of justice which the Foreign Prætors had found common to the thought of all the peoples with whom they had come into contact were manifestations of a natural, universal law of reason, a Law of Nature, superior to all systems contrived by men, implanted as a principle of life in all hearts.

271. The *jus gentium* thus received a peculiar sanction and took on a dignity and importance such as it had never had so

long as it was merely a body of empirical generalizations. Its supremacy was henceforth assured. The *jus civile* more and more yielded to its influences, and more and more rapidly the two systems of law tended to become but one.

272. **Roman Citizenship and the Law.** — This tendency was aided by the gradual disappearance of all the more vital distinctions between the citizen of Rome herself and citizens of her subject cities and provinces. Step by step the citizens first of the Latin towns, then of the Italian cities, then of favored outlying districts of the Empire, were admitted first to a partial and finally to a complete participation in Roman citizenship. And of course with Roman citizenship went Roman law. In this way the *jus civile* and the *jus gentium* advanced to meet each other. Under the emperors this drift of affairs was still further strengthened and quickened till Caracalla's bestowal of citizenship upon all the inhabitants of the Roman world was reached as a logical result.

273. **The Jurists.** — As Roman law grew to world-wide proportions and became more and more informed by the spirit of an elevating philosophy and the liberal principles of an abstract equity, it of course acquired a great attraction for scholarly men and had more and more the benefit of studious cultivation by the best minds of the city. The Roman advocate was not the trained and specially instructed man that the modern lawyer is expected to be. For some time after the law began to be systematically studied there were no law schools where systematic instruction could be obtained; there were no lawyers' offices in which the novice could serve, and discover from day to day the ins and outs of practice. The advocate was scarcely more than an arguer of the facts before the *judices:* he did not lay much stress upon his own view of the law, or often pretend to a profound acquaintance with its principles. But there did by degrees come into existence a class of learned jurists, a sort of literary lawyers, who devoted themselves, not so much to advocacy before the jury-courts, as to the private study of the law in its developments from the XII. Tables through the interpretations of the prætorial edicts and the suggestions of the *jus gentium.* They set themselves to search out and elucidate the general philosophical principles lying at

the roots of the law, to explore its reasons and systematize its deductions. These jurisprudents were of course not slow to draw about themselves a certain clientage. Though entirely distinct as a class from the 'orators,' or barristers, who assisted clients in the courts, they established in time a sort of 'office practice,' as we should call it. Cases were stated to them and their opinions asked as to the proper judgments of the law. They attracted pupils, too, with whom they discussed hypothetical cases of the greatest possible scope and variety.

274. **Influence of the Jurists.** — In the hands of these private jurists the law received an immense theoretical development. And this very much to its advantage. For Roman thinking, like Roman practice, was always eminently conservative. The jurists took no unwarrantable liberties with the law. They simply married its practice to its philosophy, no one forbidding the banns. They most happily effected the transfusion of the generous blood of the *jus gentium* into the otherwise somewhat barren system of the *jus civile*. They were chief instruments in giving to Roman law its expansiveness and universality. For of course their judgments were quickly heard of in the courts. They often gave written as well as oral opinions, and these were always hearkened to with great respect. Their published discussions of fictitious causes came to have more and more direct influence upon the result of those which actually arose in litigation. Advocates and litigants alike turned to them for authoritative views of the law to be observed. And a legal literature of the greatest permanent interest and importance eventually sprang into existence. The jurists collected and edited the written sources of the law, such as the Edicts of the Prætors, and set them in the fuller and fuller light of an advancing scientific criticism. Their commentaries became of scarcely less importance than the Edicts themselves, containing, as they did, the reasoned intent of Table and Edict.

275. **The Jurisconsults under the Empire.** — This scientific cultivation of the law by scholarly students began before the end of the Republic; was far advanced, indeed, at the time the Empire was established. The beginnings of the scientific law literature of which I have spoken date as far back as 100 B.C.

The dates 100 B.C. and 250 A.D. are generally taken as marking the beginning and end of the important literary production on the part of the jurists. The most distinguished names connected with this literature are those of Papinian, Ulpian, Gaius, and Julius Paulus.

276. It was under the emperors, however, that the greater part of this peculiar literary and interpretative development at the hands of the jurists took place. For under the imperial system the jurists were given an exceptional position of official connection with the administration of the law such as no other similar class of lawyers has ever possessed under any polity. Certain of the more distinguished of them were officially granted the *jus respondendi* which custom had already in effect bestowed upon them, but which had, until the end of the Republic, belonged only to the pontiffs. It was henceforth their right to give authoritative opinions which should be binding upon *judices* and juries. Even under the Republic the opinions of the jurisconsults had been authoritative in fact; what the imperial commission did was to render them authoritative in law. Of course if advocates or litigants who were on opposite sides in any case could produce opposite or differing opinions from these formally commissioned jurisconsults, it devolved upon the *judices* to choose between them; but they were hardly at liberty to take neither view and strike out an independent judgment of their own, and when the jurisconsults agreed the *judices* were bound to decide in accordance with their opinion. Certain writers — 'text writers,' we call them — on our own law have, by virtue of perspicacity and learning, acquired an influence in our courts not much inferior to that of the Roman jurisconsults, but no Blackstone or Story has ever amongst us been commissioned by the state to be authoritative.

277. Under the Empire the jurisconsults acquired more than the right of response: they became actively engaged in the administration of law, exercising judicial functions and applying to actual adjudication the tests which they had in the republican period applied only in the form of unofficial opinions. In the time of Augustus we find two law schools in Rome, and later times saw many others established in important provincial cities.

278. **Imperial Legislation.** — The influence of the jurisconsults extended beyond the administration to the creation of law. Leg-

islation under the early emperors, from Augustus to Hadrian, retained something of its old form. During the reign of Augustus the popular assemblies were still given leave to pass upon the laws which the Emperor, as tribune, submitted to them; and during a great part of the imperial period the Senate was formally consulted concerning most of the matters of law and administration over which it had once had exclusive jurisdiction. But neither Senate nor people were independent. The former was at the mercy of the Emperor's power as censor; the latter were at the disposal of his powers as tribune. Law, consequently, came to emanate more and more undisguisedly from the Emperor's single will, — from his edicts as magistrate and from his instructions and decisions as head of the judicial administration. Happily for Roman law, the emperors made trusted counsellors of the leading jurisconsults and suffered themselves to be guided by them in their more important law-creations and judgments. Probably most edicts and imperial decisions were prepared, if not conceived, by competent lawyers. Imperial legislation, therefore, in the most critical period of its early development, was under the guidance of the most enlightened and skilful jurists of the time, and was kept to the logical lines of its normal and philosophical growth. The jurisconsults may be said to have presided over all phases of its development at the important period when that development was conscious and deliberate.

279. **Codification of the Edict.** — The last important step in the preparation of Roman law for modern uses was its codification. Codification began with the Prætor's Edict. It had become in time a very complex and miscellaneous document. The bulk of what his predecessors in office had done each Prætor adopted: their edicts became his own, and the body of practice which thus ran on from year to year became known at length as the *edictum perpetuum*, the perpetual edict, — that part of it which the Prætor in office accepted from his predecessors as the *edictum tralaticium*, the edict *handed down* from Prætor to Prætor. Growing yearly by accretion, the edict had by Cicero's time become principally *edictum tralaticium*, and had come to resemble a body of miscellaneous case law. It was high time to subject it to revision, collation, consolidation, give it consistency and simplicity.

"Hadrian (before the year 129 A.D.) instructed the great jurist Salvius Julianus definitively to revise the edicts of the prætor *urbanus* and the prætor *peregrinus*, adding at the same time the market regulations (as to the liability of the vendor for faults, etc.) contained in the edict of the curule ædiles. By order of the emperor, the whole was then ratified by a *Senatusconsultum*. This is the so-called Edictum Hadrianum or Julianum. The edict issued by the provincial governors in the administration of justice (*edictum provinciale*) was similarly dealt with and finally reduced to definite form." (Sohm.) Prætors were henceforth deprived of the *imperium*. They were obliged to receive the edict as it had been codified, and to use it unchanged.

280. **Final Codification of the Law.** — It still remained to reduce to a single consistent body the yearly accumulating mass of imperial edicts, *senatusconsulta*, rescripts, and official opinions by which the imperial period had seen the law varied and increased. The most important efforts of this sort were those made by Theodosius (379–395 A.D.) and Justinian (529–534 A.D.). The Theodosian Code is important because it influenced the legislation of the first Teutonic masters within the Empire; the Justinian, because it was by far the most complete and scientific of the codes, and because it has been the basis of subsequent studies and adaptations of Roman legal practice the world over. The republican legislation and the prætorial edicts of the period of the Republic had received final formulation and fusion at the hands of the jurists by the time the fourth century was reached; all that remained for the emperors to do was to digest the writings of the jurists and codify the later imperial constitutions. The Theodosian Code went but a very little way in the digesting of the writings of the great law writers; the Justinian Code, however, which was prepared under the direction of the great lawyer, Trebonian, was singularly successful in all branches of the difficult and delicate task of codification. It consists, as we have it, of four distinct parts: 1. The *Pandects*, or Digest of the scientific law literature; 2. The *Codex*, or Summary of imperial legislation; 3. The *Institutiones*, a general review or text-book founded upon the Digest and Code, an introductory restatement, in short, of the law; and 4. The *Novellæ*, or new imperial legis-

lation issued after the codification to fill in the gaps and cure the inconsistencies discovered in the course of the work of codifying and manifest in its published results.

281. The whole constituted that body of laws which was to be known to the times succeeding the twelfth century as the *Corpus Juris Civilis*, or Body of the Civil Law. All law was now civil law, the law of Rome; there was no longer any necessary distinction between *jus civile* and *jus gentium*. The *Corpus Juris Civilis* became at once the law of the Eastern Empire, and for a time the law of Italy also. It did not dominate the legal developments of the West outside of Italy, however, until the Middle Ages, for Justinian had his capital at Constantinople and never controlled any important part of what had been the western half of the old Empire, except Italy, and even Italy he united only temporarily and precariously to his eastern dominions. His Code entered Europe to possess it through the mediation of the universities and ecclesiastics of the Middle Ages (sec. 328).

282. **The Completed Roman Law: its Municipal Life.** — The body of law thus completed by sagacious practical adaptations, careful philosophical analysis and development, and final codification has furnished Europe, not with her political systems, but with very many, if not most, of her principles of private right. The *Corpus Juris* has been for later times a priceless mine of private law (secs. 328–349). The political fruits of Roman law, — for it has had such, — are seen in municipal organization. Though Rome for the most part suffered the towns in her provinces to retain their own plans of government, she of course kept an eye upon the management of their affairs, and her influence and interest were ever present to modify all forms and practices which did not square with her own methods. She besides dotted not only Italy, but the banks of the Rhine and other strategically important portions of her dominions with colonies of her own citizens, who either built fortress towns where there had before been no centred settlement at all, or sat themselves down in some existing native village. In both cases they imported Roman methods of city government. Everywhere, therefore, native towns were neighbors to Roman municipal practice, and yearly took more color of Roman political habit from contact

with it. By the time of the Teutonic invasions western and southern Europe abounded in municipalities of the strict Roman pattern.

283. **Diffusion and Influence of Roman Private Law.** — But it was private, not public, law which was the great gift of the imperial codes. With the widening of the citizen right, the private law of Rome had spread to every province of the Empire. As it spread, it had been generalized to meet the varied needs and circumstances of infinitely various populations, to fit the trade and property relations of the vast Roman world, until it had become, as nearly as might be, of universal use and acceptability. It made wide and scientific provision for the establishment, recognition, and enforcement of individual rights and contract duties. It was incomparably more many-sided and adequate than anything the barbarian who for a time disturbed its supremacy could invent for himself: and it proved to have anticipated almost every legal need he was to feel in all but the last stages of his civil development. It was to be to him an exhaustless mine of suggestion at least, if not a definite store of ready-made law.

284. **Roman Legal Dominion in the Fifth Century.** — The invading hosts who came from across the Rhine in the fifth century of our era found Roman law and institutions everywhere in possession of the lands they conquered. Everywhere there were towns of the Roman pattern, and populations more or less completely under the dominion of Roman legal conceptions and practices. Their dealings with these institutions, the action and reaction upon one another of Roman law and Teutonic habit, constitute in no small part the history of government in the Middle Ages.

285. **Influence of Mosaic Institutions.** — It would be a mistake, however, to ascribe to Roman legal conceptions an undivided sway over the development of law and institutions during the Middle Ages. The Teuton came under the influence, not of Rome only, but also of Christianity ; and through the Church there entered into Europe a potent leaven of Judaic thought. The laws of Moses as well as the laws of Rome contributed suggestion and impulse to the men and institutions which were to prepare the modern world ; and if we could but have the eyes to see the subtle elements of thought which constitute the gross substance of our

present habit, both as regards the sphere of private life and as regards the action of the state, we should easily discover how very much besides religion we owe to the Jew.

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V.

TEUTONIC POLITY AND GOVERNMENT DURING THE MIDDLE AGES.

286. **Contact of the Teutonic Tribes with Rome.** — The Teutonic tribes which, in the fifth and following centuries, threw themselves into the Western Roman Empire to possess it were not all of them strangers to the polity which they overset. The Romans had often invaded Germany, and, although as often thrust out, had established a supremacy over the minds at least, if not over the liberties, of the Germans. Those tribes which had lived nearest the Rhine and the Danube, moreover, had long been in more or less constant contact with the masters of the Mediterranean and the western world, and had, of course, been deeply affected by the example of Roman civilization. Teutons had, besides, entered and, so to say, espoused the Roman world in great numbers, in search of individual adventure or advantage, long before the advent of the barbarians as armed and emigrant hosts. Rome had drawn some of her finest legions from these great races which she could not subdue. Her armies were in the later days of the Empire full of stalwart, fair-haired Germans. Even her greater officers and officials were oftentimes of that blood.

287. **Primitive Teutonic Institutions.** — When Franks and Goths and Burgundians moved as militant races to the supplanting of Roman dominion, they, nevertheless, took with them into western Europe, torn as it was by Roman dissensions and sapped by Roman decay, a fresh, unspoiled individuality of their own. They had their own original contribution to make to the history of institutions. Hitherto they had lived under a system of government combining with singular completeness, though in

somewhat crude forms, tribal unity and individual independence. Amongst them, as amongst other Aryan peoples, kinship constituted the basis of association and the primal sanction of authority; and the family was the unit of government. Kinsmen, fellow-tribesmen, were grouped in villages, and each village maintained without question its privileges of self-government, legislating upon its common affairs and administering its common property in village meeting. Its lands were the property, not of individuals, but of the community; but they were allotted in separate parcels to the freemen of the community, upon would-be equitable principles, to be cultivated for private, not for communal, profit. Chiefs there were who exercised magisterial powers, but these chiefs were elected in village meeting. They did not determine the weightier questions of custom, in the administration of justice: that was the province of the village meeting itself; and such judicial authority as they did exercise was shared by 'assessors' chosen from the whole body of their free fellow-villagers.

288. **Free, Unfree, and Noble.** — Not all their fellow-villagers were free. There were some who were excluded from political privilege and who held their lands only as serfs of the freemen of the community; and there were others, lower still in rank, who were simple slaves. There were, again, on the other hand, some who were more than free, who, for one reason or another, had risen to a recognized nobility of station, to a position of esteem, and to an estate of wealth above those of the rest of the community. But nobility did not carry with it exceptional political privilege: it only assured a consideration which put its possessor in the way of winning the greater preferments of office in the gift of the village meeting. The power of the noble depended upon the franchises of his community rather than upon any virtue in his own blood.

289. **Intercommunal Government.** — It was not often that a village stood apart in entire dissociation from all similar tribal or family centres; but when it did, the powers of its *moot* (meeting) extended beyond the choice of magistrates, the management of the communal property, and the administration of communal justice. It also declared war and appointed leaders of the com-

munal 'host.' Commonly, however, these greater matters of war and of 'foreign relations' were determined by assemblies representing more than one village. Communities sent out offshoots which remained connected with them by federal bonds; or independent communities drew together into leagues; and it was the grand folk-moot of the confederated communities which summoned the 'host' and elected leaders,— which sometimes even chose the chiefs who were to preside over the administration of the several villages.

290. **Military Leadership: the Comitatus.** — The leaders selected to head the 'host' were generally men of tried powers who could inspire confidence and kindle emulation in their followers; and such men, though in all cases chosen to official leadership only for a single campaign, never even in times of peace ceased to be, potentially at least, the heads of military enterprise and daring adventure. Not uncommonly they would break the monotony of peace and dull inactivity by gathering about them a band of volunteers and setting forth, spite of the peace enjoyed by their tribe, to make fighting or find plunder somewhere for their own sakes. About men of this stamp there gathered generally all the young blades of the tribe who thirsted for excitement or adventure, or who aspired to gain proficiency in arms. These became the military household, the *comitatus*, of their chosen chieftain, his permanent, inseparable retinue, bound to him by the closest ties of personal allegiance, sitting always at his table, and at once defending his person and emulating his prowess in battle; a band who looked to him for their sustenance, their military equipment, and their rewards for valor, but who rendered him in return a gallant service which added much to his social consideration and gave him rank among the most powerful of his fellow-tribesmen.

291. **Contrasts between the Teutonic System and the Roman.** — These features of tribal confederation and personal supremacy, though suggestive at many points of the primitive Roman state, were in strong contrast with the Roman polity as it existed at the time of the invasions. They were not only rude and primitive and characteristic every way of a very much less advanced stage of civilization, but they also contained certain principles which

were in radical contradiction to conceptions obviously fundamental to Roman state life.

292. **Roman Allegiance to the State.** — The central contrast between the two systems may be roughly summed up in the statement that the Teutonic was essentially *personal*, the Roman essentially impersonal. Neither the Roman soldier nor the Roman citizen knew anything of the personal allegiance which was the chief amalgam of primitive German politics. His subordination was to the state, and that subordination was so complete that, as I have previously said, he was practically merged in the state, possessing no rights but those of a child of the body politic. His obligation to obey the magistrate in the city or his commander in the field lasted only so long as the magistrate's or commander's commission lasted. Allegiance had no connection with the magistrate or the commander as a person: magistrate and commander claimed allegiance only as representatives of the state, its temporary embodiment. To them, *as the state*, the citizen or soldier owed the yielding of everything, even of life itself: for as against the state the Roman had no private rights. While he held office, therefore, and shared the *imperium*, magistrate or commander was omnipotent; his official conduct could be called in question only after his term of office was at an end and he had ceased to be the state's self. Of course much decay had come into the heart of such principles ere the Empire was forced to break before the barbarian; but they never ceased to be central to Roman political conception.

293. **Teutonic Personal Allegiance.** — With the Teutons, on the contrary, political association manifested an irresistible tendency towards just the opposite principles. When they came to their final triumph over the Empire they came ranked and associated upon grounds of personal allegiance. In their old life in Germany, as we have seen (sec. 290), their relations to their commanders did not cease at the close of a war sanctioned by the community, though the commission of their leaders did expire then. Many,—and those the bravest and best, — remained members of their leaders' *comitatus*, bound to him by no public command or sanction at all, but only by his personal supremacy over them. They even made themselves members of his household,

depended upon the bounties of his favor, and constituted themselves a personal following of their chosen leader such as no Roman but a fawning client would have deigned to belong to. It was a polity of individualism which presented many striking points of surprise to Roman observers. Individuals had under such a system a freedom of origination and a separateness of unofficial personal weight which to the Roman were altogether singular and in large part repugnant.

294. **Temporary Coexistence of the Two Systems.** — For long after the Teuton had established his dominion over the Romanized populations of Europe, Teutonic and Roman institutions lived side by side, each set persistent for its own people. The Germans did not try to eradicate either the old population or the old laws of the Empire. They simply carried into the midst of the Empire their own customs, which they kept for themselves, without thrusting them upon their new subjects. They appropriated to their own uses large tracts of the conquered lands, and established upon them such bodies of free landholders as they had known and built their polity upon in their old seats, either casting out those who already occupied them or reducing the occupiers to a servile condition; but much of the land they left untouched, to be occupied as before. Of course Teutonic customs, being the customs of the dominant race, more and more affected the older Roman rights, even if only insensibly; and Roman principles of right, belonging as they did to a much superior and much more highly developed civilization, which the Teuton had already long reverenced, must have had quite as great a modifying effect upon the Teutonic customs, which now, so to say, lay alongside of them. The Roman polity had entered into the whole habit of the older provincials and still retained, despite the disorders of the later days of the Empire, not a little of its old vigor and potency. It had strongly affected the imaginations of the Germans when they had touched only its geographical borders, and it did not fail in a certain measure to dominate them even now, when it was at their feet. They made no attempt to stamp it out. They, on the contrary, tolerated, respected, imitated it.

295. **'Personal' Law.** — What looked like tolerance on the part of the Teutons was in reality for the most part only a natural

outcome of certain fixed conceptions of the race. The hosts which had poured into the Roman territories were much greater and more various in their make-up than any the Teutonic peoples had gathered in their communal life in the forests of Germany. They represented tribes united: kindred tribes, indeed, but still tribes only very loosely confederated at home, if united there under any common government at all. These each had their own law. Salian Frank had one law and custom, Ripuarian Frank another; Frank had one right and practice, Burgundian another; and it was a principle everywhere observed among Teutons that, whether joined with others in a common enterprise or not, each man must be judged and given his right by his own native law, according to the custom of his own people. Each had his 'personal' privilege of blood and custom, must be adjudged by his own 'personal' law, the law of his own tribe or homeland. So at any rate we have now come to phrase it; and we know that in giving leave to the people of the Roman territories to keep their law also, the conquerors were but extending to them a habit of their own, alike in thought and practice.

296. **Relative Influence of Roman and Teutonic Systems.** — So far as any general description of this mixture of Roman and Teutonic influences may be ventured, it may be said that the Teutonic had their greatest weight on the side of political organization, the Roman on the side of the development of private rights. The Teutons, of course, tried to reproduce in their new settlements the communal life peculiar to their own native institutions; they endeavored to organize their own power, according to the immemorial fashion of their own politics, on the basis of a freehold tenure of the land and local self-administration, — a free division of the spoils on the principle of individual equality among the freemen of the tribes. They had stamped out the Roman *state* in the invaded territory; Roman *public* law they had of course displaced, destroyed. It was Roman conceptions as to private relations that gradually modified their Teutonic system. That system rested, as regarded its political features hardly less than at all other points, upon the relations of individual to individual, and as the example of the Roman practices, still preserved by the conquered populations about them, modified

these relations of individual to individual, great changes were by consequence inevitably wrought in political organization as well. Such changes were, however, not in the direction of a reproduction of Roman political method, but in the direction of the creation of that singular public polity which we designate as *mediæval.*

297. **Roman Influence upon Private Law.** — The Roman influence thus told most directly and most powerfully through the medium of Roman private law. That law had developed too complete and perfect a system, and was much too suitable to the new conditions in the midst of which they found themselves, to fail of influence amongst the new organizers. The Teutonic peoples, leaders and followers alike, were prepared to admire and heed Roman civil arrangements. The leaders had in many cases a fancy for seeming successors to the Roman Emperor. They were prompt, when their power was once established, to draw the law which was to be 'personal' to their Roman subjects into a crude but formal code, after the manner of Theodosius. King Gundobad, of the Burgundians, had such a code put together out of the older Roman codices, the writings of Paulus and Gaius, and the text-books and interpretations of the schools, so early as the year 500 A.D., five years after he had given his own people a similar statement of their own law. The new code was the "*Lex Romana Burgundionum,*" the *Roman* law of the Burgundians, as contradistinguished from their own Burgundian law; and its provisions were chiefly for their conquered subjects, not for themselves. In the year 506 came the *Lex Romana Visigothorum,* the Roman code of the Visigoths, formulated at the command of Alaric II. and generally known now as the Breviary of Alaric, the best and most influential of the barbarian codes of Roman law. It was practically the only source of Roman law known in the south of France till the twelfth century. Germany and England drew their knowledge of that law from it until the eleventh century. In 511, or thereabouts (for the date is not certainly ascertained), Theodoric the Great promulgated a like compilation of the Roman law for his Ostrogothic kingdom in Italy, a compilation which we know as the *Edictum Theodorici.* It was no small evidence of Roman influence that these greater rulers

should seek to give their subjects written law in both kinds; and the fact that only priests were literate enough to undertake the work of codification meant that Roman principles would creep at unawares even into the statements of native law; for the polity and learning of the Church had its roots in the tradition and law of Rome. 'Personal' law, nevertheless, continued to prevail. Even the greatest statesmen, like Charles the Great, did not make use of their power to cut at the roots of local custom or personal right. Sometimes it was the plaintiff, sometimes the defendant, who established his right to his own personal law in a suit; but in every case custom reigned where it could.

298. **Roman Towns.** — It was in the towns that the law of Rome had its strongholds. There it had a centred and lively influence: and there it was long undisturbed by the conquerors. It took the Teuton a long time to learn how to live in a town, within limiting walls and amidst crowded houses. His native habit called him to a freer life: the pent-up town was too rigid, too conventional, too narrow a sphere for his restless energies. He at first contented himself, therefore, with the mere formal submission of the towns: it was long before he entered them to stay and to take part in their life. Meanwhile not only Roman private law, but also Roman municipal traditions, were preparing the cities for the power and independence which they were to claim and enjoy during the Middle Ages. They were to prove Rome's most vital fragments. They nursed her law and reproduced her politics. Not Italy only, but the Rhone and Rhine countries as well, were dotted over with these abiding places of the old influences which had once dominated the world: and from them those influences were eventually to issue forth again to fresh triumphs.

299. **The Fusion of the Two Systems.** — Gradually there was brought about that fusion of German customs with Roman law and conception which, after a long intermediate fermentation, was to produce the conditions of modern political life. During the Middle Ages government gradually worked its way out from the individualism inherent in the habits of the Germanic races back into an absolutism not unlike that of the Roman Empire. The intermediate stage was *Feudalism.*

300. **Effects of Movements of Conquest upon Teutonic Institutions.** — Feudalism was preceded, however, by modifications in the Teutonic system which were not the result of their contact with Romanized peoples so much as the direct effects of conquest.

301. (1) **The New Kingship.** — The migratory conquests of the Teutons greatly emphasized for a time the principle of individualism, — the principle of personal allegiance. They advanced to their new seats not as separate marauding bands, but as emigrant nations. It was a movement of races, not of armies merely. All the freemen of the tribes came, bringing with them their families, their household goods, and their slaves, as having come to stay. But they could not preserve, when on such an errand, the organization of times of settlement and peace. They had not come, in fact, with nothing but their old and simple organization. They came with established discipline and subordination, it would seem, — with kingship already in some measure recognized amongst them, ready to be made permanent. They were forced to elevate the commander of the host to a new kingship. As confederated tribes in their old seats they had often chosen kings, who typified in their official dignity and sanctity the unity of tribal organization, who presided over the national councils, and who by reason of their preferred position enjoyed a somewhat greater state than their noble associates in the tribes. But these early kings, like the Greek kings of the Homeric songs, were scarcely more than patriarchal presidents, 'first among peers.' The later kings, in Gaul, in England, and in Spain, — the kings of the emigration, — on the other hand, ruled as well as reigned. They had first of all been the leaders who commanded the invading hosts, and who had met and routed the Roman forces which sought to withstand the stalwart immigrants; and so long as conquests remained incomplete they continued in command to complete them. Conquest being achieved, their authority was still necessary to keep their people together in dominant organization. It was only the logical and inevitable result that was reached, therefore, when they became possessed of sovereign powers of a sort such as German politics had never known before. Great as was the almost immediate transformation of commanders into kings, however, they were not yet kings such as later times were

to see in France, after feudalism should have worked its perfect work.

302. (2) **The Modified Land Tenure.** — The invading peoples doubtless at first took possession of the conquered territory by a tenure not radically different from that by which they had held their older home fields, except as it was modified by the fact that the conquered lands were already occupied by a native population, whom it was not their policy altogether to dispossess, and whose presence even as serfs would necessarily affect the system of the new masters. Those who were suffered to retain their holdings only exchanged a Roman overlordship for a German; but they constituted a new class of citizens in the German polity, and inevitably touched with Roman influences Teutonic customs of tenure.

303. It was the circumstances of conquest, however, which were the chief causes of modification. The conquered territory was naturally disposed of, in large part at least, by the leaders of conquest in accordance with military and strategic requirements. Such leaders, too, always get the lion's share of property won by arms, as these lands had been; and, by their gifts, their chief followers also are made specially rich in the new lands. Thus a new bond of personal connection is created, and conditions pregnant with profound social changes are established. It was by means of such gifts and their influence that the leaders of conquest raised up about them proprietors all but as powerful as themselves, and so both cheated themselves of full kingship, and robbed society of all chance of harmonious unity. Power fell apart into fragments, — into a vast number of petty lordships, and the Feudal System was born.

304. **The Feudal System.** — But the complex thing which we call the Feudal System was built up by no single or simple process. Feudalism was itself a process: the process by which armed and emigrant tribes, settled upon conquered territories, were compacted into states, and prepared for a new political order which should subdue the fierce individualism of the Teuton to a novel discipline of subordination and obedience. When the system had been thoroughly wrought out society resembled an army spread abroad and encamped, every freeman endowed with

a portion of land indeed, for his own tillage, but holding it by 'military tenure,' upon the condition that he would serve him of whom he held it, his immediate overlord and commander, whenever his call came to the field: that he would in all things, with a soldier's fealty, prove himself his faithful follower. Before this migration and conquest and settlement in new lands the duty of each Teutonic freeman to come into the field when summoned had been only a personal duty, which fell upon him when the summons came from the free council of his people: it had had no connection with his title to his land. But under the new order of things it had become his duty as a tenant, and it was a duty which he owed, not to the host or to the leader with whom he had voluntarily associated himself for some adventure of war, but to him of whom he held his land. And every freeman held his land thus of some one, save only the king himself. Military society had taken root in the soil. The land supported an army in which every man had a fixed place and function, failing which he was cut off from his land. A society that might have fallen to pieces, had not the unbridled independence of the Teuton been in some way checked and disciplined, was in this way held loosely together by a series of personal dependencies based upon the tenure of land. A connected series of greater and lesser landowners, the less dependent upon the greater, and all at least nominally dependent upon the king, the centre and titular head of the hierarchy: such was the pattern of feudal society.

305. **Genesis of the System.** — It is possible to distinguish in a general way the several stages by which this singular order of political life came into existence. It was many centuries in the making, and forces almost without number had their effect in creating it in its several parts; but the main outlines of what took place may be briefly stated. At first, no doubt, the Teutonic conquerors took possession of the land they had overrun like the rough freemen they were: every man, great or small, got his share of the conquered territory, and the land was covered, as in their original homes, with a yeomanry slow to call any man master or submit to any authority not of their own making. Inevitably, however, the shares of land that fell to the greater leaders of the invading hosts of freemen very greatly

exceeded those which fall to the ordinary soldier, and the king's share was greatest of all. Those to whom the greater grants fell could not use them themselves, but they could perpetuate their personal power and importance by making gifts (*benefices*) out of them to their immediate followers, gifts revocable at will and given upon condition of continued allegiance and service. The new kings, moreover, bound their immediate servants and agents to themselves by a strict oath of *homage*, which rendered them their men and vassals, and made of them as it were a permanent *comitatus*. It was natural to reward such personal agents also with *benefices:* and such a process in time bred an inevitable association of ideas. It came to be expected that vassals should receive gifts of lands from their lords. It also came to be taken for granted that those who received such gifts should render homage to those of whom they accepted them. And so land and vassalage went at last together; and every man who had land enough gave *benefices* out of it in order that he might have bounden vassals.

306. The service rendered by a vassal was only such service as a freeman might render and not be degraded. It had never been degrading in the eyes of the Teutonic freeman to be of the *comitatus* or personal following of a great leader. It did seem to him degrading to pay money, to do any menial thing, to hold himself liable to any undefined or indefinable service : but military service degraded no man, nor anything that went naturally with it. Moreover, with the greater grants of land it became customary, as the new order of things developed, to grant also a certain wholesale right of jurisdiction and government, a long list of '*Immunities*' or exemptions from higher authority in all matters not military, which in effect rendered a great estate a small kingdom. Those who received the greater holdings received also the right to be supreme lords within them: to make their own military levies, to coin their own money, if they chose, to lay taxes, and to hold their own independent courts of justice. Although at first such holdings were theoretically revocable at the will of the grantor, it naturally became more and more difficult to withdraw them. They inevitably became hereditary, and great families throve upon them.

307. The theory of the system was naturally opposed to the principle of inheritance. Each *fief* (as a feudal land gift was called) was held upon condition of military service, and no overlord or grantor could be sure that his vassal's son would be as faithful or as capable as his father. Though the heir took the estate, therefore, it became the practice for him to pay a price for the privilege of succession. The principle of inheritance, when once it crept in, was necessarily the principle of primogeniture: the fief and the responsibilities that went with it could not be divided. To grant any portion of it to another, merely for his use and service, moreover, was forbidden, except for a price paid. The fief must be kept a unit. Vassals, nevertheless, if they had land enough, made themselves masters in turn by granting portions of their land to others, upon a military tenure like their own, which rendered them more powerful without taking away from the obligations which they still owed to their own overlord and *seigneur*. The king was the nominal overlord of all; and upon some he had direct claims of authority. For to some he granted lands and immunities upon condition that they should act as his officers and representatives in the maintenance of his authority amongst the vassals about them. But the very offices became hereditary; grants and sub-grants filled the country with a long series of overlords and tenants; and the king's authority grew very remote indeed. A man's first duty was to his immediate overlord, and the king seemed very far away. The variety was completed by the granting of great territories to the Church; and then the Church feudalized its lands. "Monasteries and bishoprics parted with their land to fighting nobles on the tenure of military service [to be rendered at the call of the king], and received these persons as their vassals."

308. It was a long time before the small freeholders, come from the loins of the original conquerors, were drawn into the network of this hierarchy. Generation after generation they kept their independence and their separate ownership. But the process of feudalism was in the end too strong for them. The greater feudal lords grew to be too powerful to be safe neighbors; the feudal lawyers established it as a fundamental maxim of the law that there should be no land without its lord or *seigneur;*

and the poorer freemen, their ranks thinned by war, their properties too small to carry the burdens of independence, and their power to combine every year growing less, were fain to 'commend' themselves to the stronger owners near at hand: to give up their lands, that is, into their keeping, and receive them back again upon condition of vassalage. For the feudal overlord owed protection and all that the word implied to his vassal. Without an overlord, a man's only redress could be got in the distant courts of the king. He had no protector at hand but himself. He was outside the fixed order of society, and might any day be compelled to yield to force. And so, by the two processes of *benefice* and *commendation* the Feudal System was at last completed.

309. **Local Differences in Feudal Development.** — There was not, of course, exactly the same method of development everywhere. In England, under the Saxons, and afterwards under their cousin Danes, the new polity seems to have been held together more than elsewhere by that old cement of personal allegiance, the relations of leader and *comitatus* (secs. 290, 293); in France, and elsewhere on the continent, it was generated more directly by *territorial* connections independent of leadership and following. In the one case men were apt to own land and possess power because of their personal relations with the king; in the other, they were likely to stand in special personal relations to the king because they owned land of which circumstances had made him titular overlord. Speaking generally, so as to include both France and England, it may be said that the *benefice* was of two kinds. The English benefices were most often estates granted by the king to his personal following, to his *comites*, or to his local officers and agents, or to his less independent adherents, on condition that they should hold themselves ever ready to render him full aid and service, and ever continue to adhere to him with special fidelity. The French benefices were more generally estates originally *allodial* (that is, held under no one, but by an independent title), which had been surrendered to the king, or to some other lord of the new hierarchy, to be received back again as his gift, for the sake of the mutual obligations of faith and support thus established. Nevertheless, it is not to be understood

that benefices were exclusively of the one kind in England, and exclusively of the other kind in France. In France such estates were very often direct gifts from the king or another superior; and in England they were as often surrendered freeholds as rewarding gifts. But each country had its predominant type of the benefice. Its common mark everywhere was that it was a landed estate: not an office or any other gift, but land held upon conditions of fealty to a superior.

310. **Commendation**, on the other hand, at first at any rate, had no necessary connection with land. Its predominant feature was a personal relationship which was rather that of master and man than that of landlord and tenant. It seems to have been made necessary by the creation of benefices. As great properties grew up about them, as they became encompassed by the great network of connected estates woven out of the principle of the benefice, small landholders found it necessary to avoid collision with the growing power of their princely neighbors by throwing themselves into the arms of that power, by hastening to conform and make of their own holdings fiefs held of the lord of the greatest contiguous manor; and as society fell thus into regular gradations of personal allegiance based upon property, the freeman who was without property and the native of the conquered territory who found himself suffered to have liberty but not to hold land by any such tenure as would enable him to become a '*beneficiary*,' were both left without a place in the new social order. Owing no definite service to the powerful persons about them, they could claim no protection from them. They could be oppressed without remedy. They were driven, therefore, to '*commend*' themselves to some lord who could afford them security — such security at least as the times permitted — in return for fealty. This was 'commendation.' It had, as I have said, no *necessary* connection with the land, though the small owner as well as the landless person probably became his lord's 'man' rather by commendation than by benefice. It became a universally recognized maxim of law that 'every man must have his lord.' Whether through benefice or through commendation, he must fall into a definite place in the minutely assorted and classified society of feudalism.

311. **Political Disintegration.** — The state was thus disintegrated. It no longer acted as a whole, but in semi-independent parts. There was no longer any central authority which acted directly upon all individuals alike throughout a common territory. The king controlled directly, as he had the power, only the greater lords, who were in feudal theory his immediate vassals; other men, lower down in the series, could be reached from above only through *their* immediate masters. Authority filtered down to the lower grades of society through the higher. It was a system, not of general obedience to a common law, but of personal obedience and subordination, founded upon land-ownership.

312. Such, then, was the Feudal System. The king had no immediate subjects except the greater barons and the vassals on his own baronial estates, and the greater barons were obedient subjects only when he had armed power sufficient to compel them to obey. Their vassals served the king only when they themselves did, and because they did, arming themselves for the king, as they would arm themselves against him, only as their lords commanded. In brief, every baron was himself practically sovereign of those holding under him. It was his decree that sent them into the field; it was his power that defended them against others who would have oppressed or plundered them; and it was in his courts that justice was administered between them. His strength and favor were their shield and title. Law indeed grew up in the shape of custom; but the customs of one barony differed from those of another. Except in so far as the priest and the lawyer revived, in their advice to the magnates who consulted them, the principles of the Roman law, still alive to the studies even of that time, no uniformity of practice prepared a unified system of law for the realm. It was an arrangement of governments within governments, a loosely confederated group of inharmonious petty kingdoms.

313. **The Feudal Conception of Sovereignty.** — The most notable feature of feudalism is that in its system sovereignty has become identified with *ownership*. The rights exercised by the barons were in many cases nothing less than sovereign. Not only did they decide property titles by the custom of their baronies and

private rights by laws determined in their own courts, they often also coined money, they constantly levied tolls upon commerce, and they habitually made war when they pleased upon rival neighbors. They gathered about them, too, as the king gathered about himself, an immediate following of *knights*, whom they endowed with lands as, so to say, barons of these lesser kingdoms, the greater baronies. They commanded this retinue and exercised these sovereign powers, moreover, because of their relations as owners to the lands and tenantry of their domains. Sovereignty, in this petty parcelled kind, had become a private hereditary possession, an item in family assets. Whoever should be able to accumulate these territorial lordships into one really great kingship would be owner, and, as owner, sovereign of the realm (sec. 323).

314. **Feudalism and the Towns.** — The towns, meantime, stood out with not a little success against feudalization. Many a town was, indeed, dominated by the threatening pile of some baronial castle, built over against it on the strategic vantage ground of hill-summit or river peninsula; and all were constrained sooner or later to yield at least nominal overlordship to some feudal superior. But in the most important and powerful burgs enough of the old municipal organization and independence was preserved to transmit to the times which witnessed the downfall of feudalism at least a vivid memory of the antique communal life in which society had found its first, and up to that time its best, vigor. They kept alive if it were only a tradition, yet a fecundating tradition, of that true conception of political authority which made of it, not a piece of private property to be bartered or sold, but the organized, the uttered will of a community.

315. **The Guilds.** — Still, within the cities there early sprang up a semi-feudal organization of society altogether their own. The importance of a town rested, not upon the ownership of lands, though many towns owned not a little land, but upon wealth gained by trade and industry. The internal social organization of the towns, therefore, tended more and more to turn upon the relations of labor. The famous *guild* system sprang into existence. Every handicraftsman, every trader, — like every landowner and every freeman in the society outside the towns,

— had to find his place in a sharply differentiated social classification. Each occupation was controlled by its guild; and that guild was a close corporation, admitting to membership only whom it chose. No one could enter save through the stringently guarded avenues of a limited and prescribed apprenticeship; and once in, the apprentice was bound by the rules of his order. City government became representative of the authority of associated guilds. No one was a citizen who was not within one of the privileged associations. It is a reminiscence of this old order of things that the building about which the city government of London, as of many other antique towns, still centres is known as the 'Guildhall.' Even the militia of the towns were train-bands from the several guilds. The town, also, had created its 'estates,' its orders, as the country had done. This was its feudal system.

316. **The City Leagues.** — The greater trading towns near the Baltic and along the Rhine took advantage, during the thirteenth century, of the opportunities for independent action afforded them by the piecemeal condition of authority under the feudal system to draw together into leagues, the better to pursue their own objects; and for a very long time these leagues exercised the powers of great states, making war and peace, levying custom, concluding treaties and alliances. Their primary object was to cure those disorders of the times which made the roads unsafe and interfered with their trade. The greatest of these leagues were the *Hansa*, more commonly known in English writings as the Hanseatic (*Hansa* means trade-guild), and the *Rhenish*. The former centred about the great cities of Lübeck and Hamburg, and at one time included ninety of the towns lying between the Baltic and the Elbe. The latter had Worms and Mainz as its leaders, and at one time or another had connections with seventy towns, some of which stood as far away from the Rhine as Bremen and Nuremberg, though the arteries of trade which it was meant to protect and keep open lay chiefly along the Rhine valley. Many great princes were constrained to connect themselves with these leagues in the heyday of their power. But trade alliances afforded too many occasions for jealous discords, and the growth of vast territorial monarchies

too dangerous rivalries for the cities; and their leagues were eventually broken up.

317. **Unifying Influences.** — Two unifying influences operated more or less potently during the Middle Ages to counteract the disintegrating tendencies of the feudal system. These were the *Roman Catholic Church* and the *Holy Roman Empire*. Both the Church and the Empire may be said to have been shadows of imperial Rome. They were, by intention at least, the temporal and spiritual halves of the old empire of the Cæsars.

318. (1) **The Roman Catholic Church** had, historically, a real connection with the veritable dominion of Rome. Before the Empire had been shattered by the onset of Teutons and Turks, Christianity had become its recognized official religion. The Pope in Rome represented one of the great primacies which had early grown up within the imperial Church: and this Church of the West, sundered from the Church of the East by irreconcilable differences of doctrine, showed an instinct for conquest which seemed a direct heritage from the great pagan Rome of the olden time. She mastered the new masters, the Teutons, and everywhere insinuated herself into the new political system which developed under their hand. Not only had every castle its chaplain, every city and country-side its priest, but the greater ecclesiastics themselves became feudal lords, masters of baronies, members alike of the civil and the religious hierarchies; and even monasteries owned vast estates which were parcelled out upon a feudal tenure.

319. But for all it was so interwoven with the feudal system, the Church retained its internal unity. The Pope's power did not fall apart as did the king's. The priest acknowledged in all things his allegiance to a universal kingdom, the spiritual kingdom of the Church of Rome. That Church recognized no boundaries, whether of baronies or of states, as limits to her own spiritual sovereignty. Her authority extended, she claimed, over all kings of whatsoever grade, over all men of whatsoever rank or estate. The silent, unarmed forces of her influence, therefore, stood always on the side of an ideal unity. And they certainly retarded disintegration. Her lesson was brotherhood and a common subjection; and that lesson, though often neglected, was

never utterly lost sight of or forgotten. She kept alive, moreover, in her canon law, much of the civil law of Rome; *her* laws at any rate were not diverse, but always the same; they reached the people and the conceptions of the time through the administration not only of her ecclesiastical courts, but also, indirectly, no doubt through the judgments of the baronial courts of the baron-bishops: and whatever tended to unify law tended to unify politics. The ecclesiastical power was always on the side of any good Catholic who proved himself capable of creating larger wholes of political authority, larger areas of civil unity. By precept and by example the Church was imperial.

320. (2) **The Holy Roman Empire.** — Under the direct descendants of Chlodwig, the once vast dominions of the Franks fell asunder in several pieces; but Charles the Great (768–814) reunited and even extended them. He brought together under his sword the territory now included in Germany, Switzerland, Hungary, Italy (all save the southernmost part), France, and Belgium. And neither any Teuton nor any successor of Teutons in western Europe ever gathered wide territories under his sway without dreaming of restoring the Roman Empire and himself ascending the throne of the Cæsars. From Charles the Great to Napoleon the spell of the Roman example has bound the imagination of every European conqueror. Charles had this ambition clearly in his view, and circumstances peculiarly favored its realization. At the same time that he reached the height of his power, Rome reached the acme of her discontent with what she considered the heresies of the Eastern See, and the political disorders at Constantinople gave the Roman pontiff pretext for casting finally loose from all Eastern connections. The Empress Irene deposed her son and usurped his throne; the Italians declared that no woman could succeed to the titles of the Cæsars; and the Pope, arrogating to himself the prerogatives of king-maker, crowned Charles the Great emperor of what later generations have known as the Holy Roman Empire, — 'Holy' because created by the authority of mother Church.

321. Here was a real 'Western Empire'; the first had been only an administrative half of the once undivided dominions of the emperors. Charles gave to his empire real vitality while

he lived; he, moreover, did what he could to hasten civil unity by promulgating anew the Visigothic version of the Roman law (sec. 297); and, although his empire broke up upon his death, an almost uninterrupted line of emperors, of one great feudal house or another, carried the titles of Rome through the Middle Ages to modern times, now and again backing them with real power and always preserving for Germany a shadow at least of unity in a time of real disintegration. Believing themselves, besides, in the early times at any rate, the lineal and legitimate successors of the Cæsars, there was special reason why every emperor should continue to build, so far as he had the opportunity, as Charles the Great had begun to build, on the law of Rome as a foundation, never designedly, as Charles the Bald declared, enacting anything repugnant to it. All who from time to time drew to the side of the imperial power in the conflicts of disordered ages also naturally affected the language and principles of the same system. The Empire was, therefore, not only sometimes a silent witness and sometimes a great power for unification, but also always a steady influence on the side of a system of law more advanced and unifying than that of feudalism.

322. **Centralizing Forces: the Carolingians.** — The rise of the family of Charles the Great into power illustrates the character of the chief, indeed the only potent, centralizing forces of the feudal time. Those forces lay in the ambition of great barons. Under the descendants of Chlodwig (the Merowingians) the territory of the Franks tended more and more to become permanently divided into two distinct parts. There were often, it is true, more parts than two: for it was the Frankish custom to divide even a royal inheritance between all the sons of a deceased possessor. But, as it fell out in the long run, the most permanent division was that between Neustria (the western half) and Austrasia (the eastern). In both of these kingdoms the Merowingian rulers soon degenerated into mere shadows of their imperative, dominant ancestors; and they were presently displaced by a powerful family of Austrasia, the family of Charles Martel. Charles Martel was Mayor of the Palace under the Austrasian branch of the royal family. The office of Mayor of the Palace, though an office in the king's household, was, it would seem,

filled rather by dictation of the powerful lords of the kingdom than by a free royal choice. It was filled, consequently, at any rate in the times of which I am now speaking, by the leader of the great territorial chiefs, by the leader, that is, of the king's rivals in power. It had indeed become an hereditary office held by the greatest of the baronial families. Charles Martel was a soldier of genius: he handed his office on to his son and his grandson: and they were men abler than he. His son, Pepin, with the sanction of the Pope, whom he had greatly served, became king of the Franks, in name as well as in reality, to the final ousting of the old line of 'do-nothing' monarchs; and Pepin's grandson was Charles the Great.

323. **The Capets: Concentration of Feudal Power.** — In the tenth century a similar change was wrought in France. The descendants of Charles Martel (Carolingians) had in their turn lost vigor and become unfit for power. They were displaced, therefore, in the western half of their dominions (in Neustria) by a family of warriors whom they had endowed first with the county of Paris, and afterwards with the duchy of France, as at once a reward for their services in withstanding the incursions of the Northmen and a stake in the threatened territory. The duchy of France was only a comparatively small district about Paris; but the vigor and capacity of the Capets, its dukes, speedily made it one of the most important feudal properties in the whole of the great territory to which it was eventually to give its name. They became the chiefs of the baronial party, and when discontent with the Carling kings culminated it was they who became first 'kings of the barons,' and finally kings of France. Refusing to degenerate, as the Merowingian and Carolingian princes had degenerated, they continued to develop, generation after generation, a kingdom destined one day to rank with the greatest of Europe; and that by a process planned as if meant to illustrate how best the feudal system might be used for its own destruction. By every means, — by war, by marriage, by contract, by stratagem, by fraud, — they drew all the greater feudal sovereignties into their own possession, until at length, their duchy of France and the kingdom of France were indeed identical; until, having absorbed all scattered authorities, they had made

sovereignty, once possessed privately in sundered pieces, again a whole,— but a whole which, by the strict logic of feudalism, was their private estate; until they almost literally possessed the land, and Louis XIV. could say with little exaggeration, '*L'état c'est moi.*' They had gathered the fragments of the feudal system into a single hand, and had made the state itself a feudal possession, a family estate.

324. **The Piecing together of Austria and Prussia.** — Later still the same process was repeated in Prussia and in Austria. By conquest, inheritance, forfeiture, marriage, contract, fraud, powerful feudal families pieced together those great kingdoms, to become in after times the bases of national organization. In neither Prussia nor Austria did the process go so far as in France, though Austria, under the great house of Habsburg, became possessor of the imperial throne of the Holy Roman Empire, and Prussia, under the equally great house of Hohenzollern, has become the central and dominant state of a new German Empire, which, through the healthful processes of modern national life, if not through the happily obsolete forces of absolutism, may yet be as truly compact and unified a kingdom as any the world has seen.

The Diffusion of Roman Law in Europe.

325. From the fifth to the twelfth centuries Roman law inhered in the confused civil methods of the times for the most part as a mere unsystematized miscellany of rules applicable to the descendants of the Roman provincials and observed largely within the towns. As the old distinctions between Roman and Teuton faded away, however, in the gradual mixture of the populations, these rules entered more and more into the general mass of common custom. This process was in great part unconscious; there was no scientific selection in the development.

326. **The Barbaric Codes.** — It was not from mere tradition, however,— not simply from Roman law transmuted into unrecorded provincial custom,— that the knowledge of these centuries concerning the civil law of the Empire was derived, but from fragments of the Theodosian legislation and of the writings of the jurists which had found embodiment in the Code of Alaric II.

(sec. 297), which is known to quotation as the Breviary (*brevarium Alaricianum*). The West Goths themselves had not long remained contented with that compend of the law. In the seventh century there had been prepared in Spain a new *Lex Visigothorum* which contained a summary, not of Roman rules only, but of Gothic custom as well, and which, superseding the earlier compilation of Alaric, formed the basis for later codifications of Spanish law. But the south of France, which had once owned the dominion of the Visigoth, retained the Code of Alaric; it was transmitted thence to the north of France, to be handed on to Germany and England; and for all of these countries it continued to be the chief, if not the only, source of Roman law until the eleventh or twelfth century. Charles the Great, as I have said, republished it, accepting it as the recognized manual of Roman legal principle. Even Italy had had the continuity of her legal tradition broken by barbarian invasion,— especially by the inroad of the raw Lombards,— and had had to keep the fragments together as best she might amidst just such a confusion of 'personal' laws as prevailed elsewhere in the once Roman world (sec. 295).

327. **Custom and Written Law in France.** — It was at this time that the north and south of France came to be distinguished as repectively the 'country of custom' (*pays de coutume*) and the 'country of written law' (*pays de droit écrit*). In the south, which had been thoroughly Romanized for centuries, there was the written law of Rome; in the north, which had never been so thoroughly Romanized, and which was now quite thoroughly Germanized, there reigned in unrestrained confusion the Teutonic customs of the barbarian masters.

This division corresponded closely with the division between the *langue d'oc* and the *langue d'oil*. The districts of the *langue d'oil* (of the Frankized Latin) were the country of custom; the districts of the *langue d'oc*, the country of written law.

328. **The Study of the Roman Law.** — But in the twelfth century the law of Rome fell upon the good fortune of being systematically studied once more by competent scholars, and once more cultivated by scientific lawyers. And not the Code of Alaric, but the vastly more perfect *Corpus Juris Civilis*, as the

twelfth century called it, Justinian's (or, rather, Trebonian's) great compilation, which Germanized Europe had hitherto used scarcely at all,[1] was the basis of the revived study. The new cultivation of the law began, naturally enough, in the Italian cities. There the movements of trade were quick and various; and there a various population was not only mixed of many elements but fused and united, by intermarriage no less than by close social, political, and commercial intercourse. For the quick, informal, multifarious operations of trade Teutonic law had made no more suitable provision than had the *jus civile* in the old days at Rome: a *jus gentium* was needed such as the Roman jurisprudence stood ready to supply. 'Personal' law could not obtain where elements were so fused and united by common undertakings and interests as well as by an actual mixture of bloods. "In Justinian's Digest the Italian jurists of the twelfth century found a system of law that was adequate to the needs of the new commerce;" and great schools sprang promptly into existence for its study and propagation. The first of these was also to be the most famous, the University of Bologna, established late in the eleventh century, and destined to become the chief seat of the study of the Roman code. Pisa and other Italian cities then took up the new pursuit. Presently the interest had spread to France and to Spain, going in France first to Montpellier and Paris, afterwards to Bourges, Orléans, and Toulouse, the old capital of the West Goths; and in Spain creating (A.D. 1254) the notable University of Salamanca. From Spain and France, Holland caught the fashion, giving to Europe in the seventeenth century the illustrious jurist Hugo Grotius, who created out of the great principles of equity discoverable in Roman Law the elevated and influential science of International Law (sec. 1457). In England, too, the same studies began to be affected almost immediately after the rise of the school of Bologna, and are said to have been regularly pursued there down to the sixteenth century.

329. This sudden spread and luxuriance of the study is impressive evidence of a common preparation and need for it. The

[1] The Digest and the Codex were in some measure made use of by the canonists throughout the Dark Ages.

cultivation of the Roman law in the schools may in some instances indicate a clerical influence; but the study was too general and too spontaneous to be attributable mainly to this or to any other single cause.

330. **Influence of the Schools.** — The Italian schools of law almost immediately drew to them students from all parts of Europe, and, in time, "sent out masters and doctors by the hundreds." Priests and laymen alike got their training in them. "Returning to their homes, the civil doctors crowded the hereditary expounders of local usage off the judicial bench. Under the fostering care of kings and princes," interested to see a centralized power built up by their courts, there grew up everywhere bodies of accomplished lawyers and a 'learned judiciary'; and "Europe obtained a common commercial law in the *Corpus Juris Civilis*, as it had obtained a common family law in the *Corpus Juris Canonici*," the developed jurisprudence of the Church.

331. **The materials** upon which teachers and students alike worked in the schools were not the pure sources of the Roman law, but a mixture of Roman, canonical, and Lombard law which showed the influence of an earlier cultivation of jurisprudence by learned men among the Lombards in their school at Pavia.

332. **Influence of the Church.** — The Roman Church had early effected a conquest of the Teutonic invaders, and the new masters of Europe had left its organization intact. "It cared for education and dispensed charity. It drew into its domain the entire control of the family relations. It undertook, partly in its own interest, to enforce testaments," or wills, after the Roman manner. The Teutonic peoples, held together by ties of consanguinity and accustomed to communal rather than to individual ownership in matters of property, had not admitted to their law conceptions of free contract, individual ownership, and succession by will such as the developed jurisprudence of Rome had given currency to. But the will, the contract, and the principle of separate ownership were indispensable to the Church if she was to build up her properties by the gifts and devises of pious persons to whom her priests were permitted to minister. "They were also characteristic and essential elements in the civilization amid which the Church had been reared to maturity." (Maine.) The

whole weight of the Church's power was thrown, therefore, in favor of the adoption of these important doctrines and practices out of the law of Rome. And she was able to make her great influence tell in all the matters to which she gave her attention because she "had brought over from the Roman into the mediæval world a well-developed governmental organization. She added to this a complete set of courts, with appeal to Rome." (Smith.) And her priests possessed the learning of the time; were indispensable as counsellors and administrators, no less than as clerks; were the compilers of codes, whether of Roman or of Teutonic rules; had in all things the ascendency of training and knowledge.

333. **The currency of the Latin language** had also its influence in spreading abroad the forces which were to bring in the Roman law. It was everywhere in Europe the speech of commerce, of learning, and of public business: the common repository and vehicle of knowledge and of the forms of important transactions.

334. **Entrance of Roman Law into the Legal Systems of Europe.** — Of course this widespread interest in the study of Roman law was not all speculative. The study and the practice of the law acted and reacted on one another. Its rules were more and more consciously and skilfully fitted into the growing law of the kingdoms which were emerging from the feudal system because it was being adequately mastered and systematized at the universities; and it was being mastered and systematized at the universities because it was being more and more called for in the actual administration of justice. Its use and its cultivation went hand in hand.

335. **In France.** — Roman law came into use with much the same pace with which the Capets advanced to complete power, and triumphed with the perfecting of the centralization which they effected. Louis IX. ordered the Roman law translated into French; established the right of the crown to hear appeals from the feudal courts in all cases; sent royal judges on circuit to hear complaints of infringed rights; and erected at Paris the famous *Parliament of Paris* as the supreme tribunal of the realm. The feudal lords of France were the nominal members of this court, but trained jurists (*legistes*), appointed as experts to assist them, became in practice its real members. Schooled in the

Roman law, they admitted its principles into all their decisions; and they gave to the king from the same source the maxim which declared the will of the prince to be law. As the king's jurisdiction grew, the principles of Roman jurisprudence gained wider and wider acceptance and supremacy.

336. **The Method** by which Roman law crept in was always the same: it was introduced, not by legislation, but by adjudication, by the decision of cases in the royal courts. It was here that the learning of the trained lawyers told, and the desire of the king to see the single power of the throne magnified. The royal courts, as they were developed in the provinces, applied local custom in their decisions, for the most part, only upon very conclusive proof of its existence and its definiteness, and in the absence of definite and conclusive proof of a contrary custom resorted always to the Roman as to a 'common' law. The law grew thus, and was made consistent, by judgment, by written opinion, by royal ordinance; and a French jurisprudence began to make its appearance, working upon the various materials which were to enter into the final law of the land.

337. And presently the Roman law came, so to say, from out the nation to meet the royal system. Very early in Berri, Bourbonnais, and Auvergne, the central districts of France, the law of Rome had been consciously adopted as the common law of the land, to be appealed to in the absence of proof of any special custom or enactment. Subsequently it came to be considered as in some sort the supplementary common law of all France, for, though never established as such in the north of France, it was even there appealed to in doubtful cases as 'written reason.' The *Code Napoléon*, the last great codification of French law, has been described as in great part a republication of the laws of Justinian as those laws have been modified and fitted to new circumstances by the processes of French history. The statement ought, however, to be taken with an important qualification. A very great deal of Germanic law found permanent place among accepted legal principles in France, though Roman law contributed the chief formative forces, the forces of fusion and system.

338. **Local Custom in France.** — It is important to observe that the unifying, harmonizing influences exercised by the grow-

ing royal jurisdiction were, for a long time at any rate, influences which affected *procedure* much more than the internal, essential elements of legal principle. The differentiation between district and district which had taken place in the process of feudalization had been of the sharpest, most decided character. When the Capets first assumed the titles of kingship there were duchies as great as France. The work of extending and consolidating the kingdom consumed several centuries; and, meanwhile, each petty sovereignty was developing its own law apart. Much of the territory which afterwards became part of France was, during the same period, moreover, in foreign hands, held by England or Burgundy. The kingdom as finally consolidated, therefore, presented a very great variety of deeply rooted and persistent local laws and customs. Normandy had one set of customs, Berri a very different set, Anjou a third, Brittany a fourth; and so throughout the once piecemeal country.

339. **Unifying Influence of the Royal Prerogative.** — The influence of the royal jurisdiction upon this heterogeneous mass of differing laws was, as I have said, at first rather to unify and systematize the procedure of the local courts, which administered local law, than to effect changes in the local customs themselves. Since appeals to the king's justice were possible in all cases, the formal method of appeal tended to become the same everywhere; and the methods of the king's courts in dealing with appealed cases more and more tended to set the fashion of procedure throughout the loose system, though the royal judges continued to decide appealed cases according to the law of the district from which they were brought up.

340. By degrees, however, new ideas and principles, as well as new modes of procedure and appeal, were infused into local justice. The law and the legal practice of each district alike more and more distinctly and consciously approximated to the models of organization and to the standards of decision obtaining in the king's courts. The territorial tribunals accepted the services of lawyers trained in Roman principles and inclined towards regal precedents; and the local law officers of the crown were of course everywhere ready to effect whatever was within reach of their functions or example in the way of bringing local custom

around to the rules of universal acceptance to be found in Roman law and regal decision. Independently, moreover, of the influence of the crown, the Roman law was entering the local courts, becoming common law in Auvergne and Bourbonnais, as we have seen, before it became the common law of France.

341. Through the *Parliament of Paris* the Roman law had, so to say, a double door of entrance. The jurisdiction of that court was both spiritual and temporal: so that both the Code of Justinian and the canons of the Church contributed their versions of Roman judicial practice and tradition to its findings.

342. **In the Code Napoléon**, the final codification of French law as it had emerged from the long processes of the Middle Ages, we find a statement of the law which was in fact made possible by the earlier labors of great French jurists, like the accomplished Pothier. In matters of inheritance, in the rules which govern the family relations, and in the law of marriage the customs of France find their place, though as if they had been digested and formed anew under the influence of the Roman jurisprudence. In the law of contract, the law of property, the rules of judicial trial, and all questions of the legal burdens which may be placed upon land, Roman law has had a chief place of influence. Everywhere, however, there are traces and elements of fusion. It is a law written over with history and with the labors of trained students of the law.

343. **In Germany** there was no central power such as that which served to build together the legal systems of France and of England. The feudal system had done its work more thoroughly there than elsewhere: and Germany emerged from the Middle Ages, not a nation, but a congeries of petty states. There was a form of union among them, indeed, in the Holy Roman Empire, and throughout all the changes of German history the imperial influence had sought to shelter and to foster Roman law, the law of empire and of princely rule. The imperial courts, the imperial lawyers, the imperial party in Germany, were always administrators or advocates of its principles; and when the house of Habsburg came to the imperial throne, as when other powerful emperors had reigned, there was no small potency in these influences. But the final reception of the Roman law was postponed

in Germany until the sixteenth century, and was due to other forces than those associated with the royal power.

344. **Reason for Germany's Reception of Roman Law.** — The reception of the Roman law into the law of Germany was due to various circumstances and influences, but not to the poverty or imperfections of German law. German law was both rich and full in its development: at some points it may fairly be said to have been superior to Roman law in its suitability to the needs and conditions of the time. Neither was the law of Rome received as naturally supplementary to German law and of a sort to effect its further and more complete development; for there were not a few radical oppositions of principle between the two systems. For example, Roman law was based upon the recognition of the entire equality of persons, while German law ranked them in orders, with differing values and privileges; Roman law allowed the free alienation of land and set up the principle of absolute individual ownership, while German law had at its root ideas of communal and family ownership and put many restrictions upon alienation. Moreover, there could be no doubt that the law of feudal relationships had had as complete a development in Germany as anywhere else in the European world; and yet, along with the Roman law, which she took from the schools and commentators of Italy, Germany took also the Italian Feudal Law, to which the Italian students had given a similar systematic formulation.

345. The Roman law was received in Germany because of the feebleness and disintegration of the judicial system there; because the old popular courts, which administered only an unchanging custom and tradition, inevitably decayed with the growth of society; because single judges trained to the law were substituted, and the only law in which one could be trained was the Roman law of the Italian schools. "The popular court," as Professor Sohm says, "is the natural enemy of Jurisprudence." "The Roman law was received," he declares, "not because it was Roman, not because it was the better, law, but because it was scientific law," — not because of its contents, but because of its form and exactitude. "Because we needed the foreign jurisprudence, we received the foreign law." The introduction took

place, not because princes controlled the courts, but because litigants insisted. They were dissatisfied with the administration of justice in the unlearned courts. They wanted a court, a judge, learned in the law. "The single judge must be a learned judge, by the same necessity by which the old popular court was an unlearned court."

346. Throughout the Middle Ages the popular courts remained the only vital courts in Germany; when they first began to give way their place was taken by courts that were no better, being made up of some unlearned agent of the feudal lord of the district, assisted by assessors as little trained for the function as he. In France and in England a native jurisprudence grew up, because the royal power was able to set up a system of courts, to put trained officers into them, and to draw differing local customs to a common administration and development. But there was no power capable of rendering the like service in Germany the decay of the popular courts did not mean the substitution of an indigenous learning. The single judges finally set up there were learned, if trained at all to the law, in the Italian jurisprudence. Germans had long studied in Italy; and the Roman law of the Italian schools was taught from their foundation in the German universities. All theological students were obliged to study the Roman and canonical law as part of their regular professional training; for it formed the basis of the administration of the spiritual courts, which had so long stood alongside the courts of ordinary law in every part of Europe. "The occurrence which we call the reception of foreign law," says Professor Sohm, "consisted entirely in this, that the jurisprudence which already ruled in the spiritual courts took possession also of the civil courts."

347. **The law that was received** was not the *Corpus Juris* of Justinian, but the common law of Italy, founded upon the Roman, the canon, and the Lombard law. "The *Corpus Juris* was *terra incognita* to the German jurists of the period of the reception." They brought in, "not the Pandects, but the *Usus modernus Pandectarum* of the Italian lawyers." It was the great Savigny of our own century who first carried German legal study back to the pure sources of the Roman law, and great was the confusion pro-

duced by the substitution. The new law was not, of course, accepted whole and in bulk. It entered, in Germany as elsewhere, as 'subsidiary' law, not as the native law of the land. It nevertheless received everywhere a decided preference in the courts. While accepting Roman legal rules as *prima facie* conclusive of the rights of a suitor, they imposed upon those who alleged established local usage in opposition to it the necessity of furnishing conclusive proof of the existence and acceptance of such usage as law. Roman law, in brief, they accepted on its own authority, Germanic custom only on the authority of indubitable circumstantial testimony.

348. **The outcome** was that, speaking most generally, the Roman law prevailed in the field of procedure, in the field of criminal law, in the field of contract, and in the field of the law of inheritance; while German law persisted in respect of the law of real property, in respect of family law, and wherever law was to be drawn on to the recognition of new relationships, like those of association and incorporation, in a changing society.

349. **In England**, a strong native jurisprudence kept the foreign law out. Always held off from the rest of Europe by the sea, a separate system of law was made possible for her, no less than an independent government. The royal power was able to make of the favored island a compact kingdom: and men of the masterful Plantagenet blood gave it a centralized administration of justice such as no other European state was able to obtain while yet it was in its early formative stage of growth. English judges put together a consistent English law, and there was no need for a foreign jurisprudence.

350. And yet the Roman law was not wholly excluded. The Romans had governed Britain four hundred years, bending the province to the purposes of their administration with their usual thoroughness. We know that Papinian, the greatest of Rome's jurists, himself administered the law in Britain, and we have every reason to believe that its promulgation there was thorough, its rootage full four hundred years deep. It can hardly be that the Saxons wholly eradicated it. We know that many Roman municipalities on the island survived all conquests: and we know

that the priests of the Church of Rome early took back to Englished Britain conceptions steeped in Roman jurisprudence. Bede testifies that the Saxon laws were codified under the auspices of the clergy and that Roman codification was the model. We have seen that Roman law was studied in England almost as early as in mediæval Italy herself, the study being continued without serious break for more than three centuries (sec. 328); and the works of the earliest English legal text-writers, such as Bracton, Glanvil, and the author of the *Fleta*, abound in tokens of a close familiarity with the laws of the imperial codes, are full of their very phraseology indeed. The so-called laws of Henry I. are said by competent legal scholars to consist, to the extent of fully one-half their content, of precepts borrowed from Rome. Through the ecclesiastical courts, which down to the middle of the present century administered upon all estates in England, and upon all trusts; through the Court of Chancery, whence has issued the system of English equity, and which was presided over in its formative period by the great ecclesiastics who were the first chancellors, afterwards by great lawyers, such as Lord Hardwicke and Lord Thurlow, deeply versed in the civil law of Rome and apt to draw suggestion and even concrete rule from it; and through the Admiralty Courts, always controlled by the rules of the Civil Law, England has drawn directly or indirectly from Roman sources, in supplement of her own indigenous Germanic customs; and not many portions of her law have escaped being in some degree marked by the same influences that have moulded the law of the rest of Europe. Her borrowings, nevertheless, have been of form and method rather than of substance, and the great bulk of her law is her own.

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VI.

THE GOVERNMENT OF FRANCE.

351. **The Growth of the French Monarchy.** — The full political significance of the history of France can be appreciated only by those who keep in mind the chief phenomena of the widening monarchy, the successive steps by which the Dukes of France, the capable Capets, extended their power and the name of their duchy over the whole of the great territory which was to be inherited by Louis XIV. The course of French history is from complex to simple. In the days of Hugh Capet 'France' was the name of only a single duchy centering in Paris, of but one of a great number of feudal lordships equally great, equally vigorous, equally wedded to independence. The duchy's advantage lay in the fact that her dukes had been chosen for leadership and that they were capable of leadership, rather than in the possession of preponderant strength or superior resources. To the west of her lay the solid mass of Normandy; to the north lay the territories of the Counts of Flanders and Vermandois, and to the east the territory of the Count of Champagne; southward lay the great duchies of Burgundy and Aquitaine, beyond them the lands of Toulouse; alongside of Normandy, Anjou and Brittany stretched their independent length to the west. And these were only the greater feudal sovereignties. Within and about them lay other districts not a few with masters ready to assert privileges without number in contradiction of all central rule. The early history of France is the history of a duchy striving to become a kingdom. 'France' holds a good strategic position, and fortune has made her dukes titular kings over their feudal neighbors, but still she is in reality only one among many duchies.

352. By slow and steady steps, nevertheless, a work of unifica-

tion is wrought out by the Capets. In every direction they stretch out from their central duchy of France their hand of power and of intrigue and draw the pieces of feudalized Neustria together into a compact mass. The work is thoroughly done, moreover, at almost every stage. Out of populations as heterogeneous as any in Europe they construct a nation singularly homogeneous; out of feudal lordships as strong, as numerous, as heady, and as stiffly separate as any other equal territory could show, they construct a single kingdom more centralized and compacted than any other in Europe. The processes of these remarkable achievements give to the history of the French monarchy its distinctive political significance: the means which the Capets devised for solidifying, and, after its solidification, for enlarging and effectuating their power, furnish some of the most suggestive illustrative material anywhere to be found for the general history of government.

353. **Perfection of the Feudal System in France.** — The feudal system worked its most perfect work in France. The opportunities of feudalism there were great. Neustria, the western, Gallic half of the great Frankish kingdom, was early separated from Austrasia, the eastern, Germanic half (secs. 322, 323), and its separateness proved the cause of its disintegration. Burgundy, Brittany, and Aquitaine sprang to the possession of unchecked independent power round about it; the Normans thrust their huge wedge of territory into it; battle after battle between those who contended for the possession of the pieces of the great empire which Charles the Great had swept together first decimated and finally quite annihilated the sturdy class of Frankish freemen whose liberties had stood in the way of local feudal absolutism; privilege grew in the hands of feudal lords while prerogative declined in the hands of those who sought to be kings; those who possessed privilege built for themselves impregnable castles behind whose walls they could securely retain it: — and feudalism had its heyday in France.

354. It is reckoned that in Hugh Capet's day the "free and noble population" of the country out of which modern France was to be made numbered "about a million of souls, living on and taking their names from about seventy thousand separate fiefs or properties: of these fiefs about three thousand carried titles with them. Of these again, no less

than a hundred, — some reckon as many as a hundred and fifty, — were sovereign states, greater or smaller, whose lords could coin money, levy taxes, make laws, administer their own justice."[1] Of these one hundred, however, only some eight or ten were really powerful states.

355. **Materials of the Monarchy.** — Such were the materials out of which the Capets had to build up their monarchy. It was their task to undo the work of feudalism. Nor were these the only materials that they had to handle in the difficult undertaking. There were other privileges besides those of the feudal barons which it was necessary to destroy or subordinate before they could see their power compact and undisputed.

356. **Local Self-government.** — Notwithstanding the fact that in most districts of the divided territory the power that ruled him was brought close to every man's door in the person of his feudal lord and master, there were many corners of the system which sheltered vigorous local self-government. The period of the greatest vitality of the feudal system was, indeed, the only period of effectual local self-government that France has ever yet known. The eventual supremacy of the Crown, which snatched their power from the barons, also destroyed local self-government, which the barons had in many cases suffered to grow; and neither the Revolution nor any of the governments which have succeeded the Revolution has yet restored it to complete life. Local liberties were taking form and acquiring vigor during the very period in which the monarchical power was making its way towards supremacy; and it was by these local liberties that the kings found themselves faced when their initial struggle with feudalism was over. It was their final task to destroy them by perfecting centralized administrative organization.

357. **Rural Communes.** — While feudalism was in its creative period, while the forces were at work, that is, which were shaping the relations of classes and of authorities to each other, it was not uncommon for feudal lords to grant charters to the rural communes lying within their demesnes. In and after the twelfth century these charters became very numerous. They permitted a separate organic structure to the communes, regulated the admission of persons to communal privileges, laid down rules for

[1] G. W. Kitchin, *History of France*, Vol. I., p. 186.

the administration of property in the commune, set forth feudal rights and duties, prescribed the corvées, etc. "Everywhere a general assembly of the inhabitants directly regulated affairs," delegating executive functions to communal officers, who acted separately, each in the function with which he was specially charged. These officers convoked the general assembly of the people for every new decision that it became necessary to take with reference to communal affairs. The principal affairs within the jurisdiction of the assembly were, "the administration of communal property, which in that period was very important, police, and the collection of the taxes both royal and local."[1]

358. In the administration of justice, also, the Middle Ages witnessed in France not a few features of popular privilege. The peasant as well as the nobleman had the right to be tried by his peers, — by persons of his own origin and station. In the courts of the feudal barons the vassals were present to act as judges, much as the freemen were present in the English county courts (secs. 836, 942).

359. **Liberties of Towns: the Roman Municipalities.** — The privileges of self-direction granted to the rural communes, however, were privileges granted, so to say, *inside vassalage:* the members of the communes were not freed from their constant feudal duties. Many towns, on the contrary, acquired and maintained a substantial independence. When the earliest Frankish kings failed in their efforts to establish a power in Gaul as strong and as whole as the Roman power had been, and the Frankish dominion fell apart into fragments whose only connection was a nominal subordination to a central throne, there were others besides the great landowners to avail themselves of the opportunity to set up independent sovereign powers of their own. The Franks, as we have seen, had found many Roman cities in Gaul, and, not at first taking kindly to town life, had simply conquered them and then let them be (sec. 298). In these, consequently, the old Roman organization had endured, freed from Roman dictation. The Franks who entered them later took character from them almost as much as they gave character to them. Germanic principles of moot-government and individual freedom entered,

[1] H. de Ferron, *Institutions Municipales et Provinciales Comparées*, p. 3.

to a certain extent, like a new life-blood into the Roman forms, and compact, spirited, aggressive, disciplined communities were formed which were quick to lay hold of large privileges of self-rule, and even to assume semi-baronial control of the lands lying about them, in the days when independent powers were to be had for the seizing. The organization which Roman influences had bequeathed to these towns was oligarchical, aristocratic: the governing power rested with close corporations, with councils (*curiæ*) which were coöptative, filling their own vacancies. But forces presently appeared in them which worked effectually for democracy. The Christian Church, as well as the barbarian Teuton, took possession of Gaul: the greater towns became the seats of bishops; and the bishops threw their weight on the side of the commons against both the counts outside the towns and the oligarchs inside. Only so could the magnates of the Church establish themselves in real power. In most cases the ecclesiastics and their restless allies, the commons, won in the contest for supremacy, and democracy was established.

The Italian towns, with their 'consuls' and their other imitations of the old Roman republican constitution, are perhaps the best examples of this renaissance of democracy.

360. **The Non-Roman Municipalities.** — These Roman towns, however, were to be found for the most part only in the south and along the Rhine. North of the Loire, as the Franks took gradually to city life, there sprang up other towns, of Germanic origin and character; and these were not slow to agitate for grants of special privileges from their baronial masters. In very large numbers they obtained charters, — charters, however, which were to give them a connection with the feudal system about them which the towns of the south, antedating feudalism, did not for some time possess. They were given substantial privileges of self-government, but they were not severed from baronial control. They conducted their affairs, on the contrary, under charters in which the relative (customary) rights of both seigneur and *burgher* were definitely ascertained, by which seigneurial authority as well as burgher privilege was fully recognized, and under which, moreover, the authority of the seigneur was actively ex-

ercised through the instrumentality of a *Prévot*, the lord's servant and representative in city affairs.

361. This, the more secure form of municipal self-government, because the form which was most naturally integrated with the political system about it, — a form, moreover, which very naturally connected itself, mediately, with the supreme seigneurial authority of the king, — became in course of time the prevalent, indeed the almost universal, type in France. The 'prévotal' town is the normal town down to the end of the fifteenth century.

362. Not all of this development was accomplished peacefully or by the complaisance of the barons. Many cities were driven to defend their privileges against the baronage by force of arms; some, unable to stand out unaided against feudal aggressions, were preserved from discomfiture only by succor from the king, whose interest it served to use the power of the townsmen to check the insolent might of the feudal lords; others, again, were repeatedly constrained to buy in hard cash from neighbor barons a grudging tolerance for their modest immunities. The kings profited very shrewdly by the liberties of the towns, drawing the townspeople very closely about themselves in the struggles of royal prerogative against baronial privilege. As supreme lords in France, they assumed to make special grants of municipal citizenship: they made frequent gifts of *bourgeoisie* to disaffected vassals of the barons, — gifts so frequently made, indeed, that there grew up a special class of royal townsmen, a special *bourgeoisie du roi*.

363. **The Towns and the Crusades.** — Not the least important element in the growth of separate town privileges was the influence of the crusades upon the power of the nobility. When the full fervor of crusading was upon France, her feudal nobility were ready to give up anything at home if by giving it up they might be enabled to go to the holy wars, to the prosecution of which Mother Church was so warmly urging them. Their great need was money; money the towns had; and for money they bought privileges from departing crusaders. Very often, too, their one-time lords never returned from Palestine — never came back to resume the powers so hastily and eagerly bartered away before their departure. When they did return they returned impoverished, and in no condition of fortune to compete with those who had husbanded their resources at home. On every hand opportunities were made for the perpetuation of town privileges.

364. **Municipal Privileges.** — The privileges extorted or bought by the sturdy townspeople were, to speak in general terms, the right to make all the laws which concerned only themselves, the right to administer their own justice, the right to raise all taxes (as well those demanded by king or baron as those which they imposed upon themselves for their own purposes) in their own way, and the right to discipline themselves with police of their own appointing. Such villages as contrived to obtain separate privileges could of course obtain none so extensive as these. They often had to seek justice before baronial rather than before their own tribunals; they could by no means always choose their own way of paying unjust charges; they had often to submit to rough discipline at the hands of prince's retainers; oftentimes the most they could secure for themselves was a right of self-direction in petty matters in which no one else was immediately interested.

365. The administrative functions exercised by the towns have been thus summed up: the administration of communal property, the maintenance of streets and roads, the construction of public edifices, the support and direction of schools, and the assessment and collection of all taxes.[1]

366. **Forms of Town Government.** — The forms of self-government in the towns varied infinitely in detail, according to place and circumstance, but the general outline was almost everywhere the same. Often there were two assemblies which took part in the direction of municipal affairs, an Assembly of Notables and a General Assembly of citizens. These two bodies did not stand to each other in the relation of two houses of a single legislature; they were separate not only, but had also distinct functions. The popular body elected the magistrates; the select body advised the magistrates; the one was a legislative, the other an executive, council. More commonly, however, there was but one assembly, the general assembly of citizens, which elected the magistrates, exercised a critical supervision over them, and passed upon all important municipal affairs. The magistracy generally consisted of a mayor and aldermen who acted jointly as the executive of the city (its *corps de ville*), the mayor in most cases being only

[1] Ferron, p. 8.

the president, never the 'chief executive,' of the corporation, and mayor and aldermen alike being equal in rank and in responsibility in exercising their corporate functions.

367. **Decay or Destruction of Municipal Self-government.** — From this democratic model there were, of course, in almost all cases, frequent departures, quite after the manner formulated by Aristotle (sec. 1397). Oligarchy and tyranny both crept in, time and again; nowhere did local liberties permanently preserve their first vigor; everywhere real self-government sooner or later succumbed to adverse circumstances, crushed in very many cases by the overwhelming weight of the royal power. Generally such changes were wrought rather by stress of disaster from without than because of degeneracy within: and in very few cases indeed did local liberty die before the community which had sought to maintain it had given proof of a capital capacity for self-government. The independence of the cities died hard and has left glorious memories behind it.

368. **Pays d'États.** — Early times saw self-government in the provinces also. Many a feudal province had had its own 'Estates,' its own triple assembly, that is, of nobles, clergy, and burghers, which met to discuss and in large part, no doubt, to direct provincial affairs. The provinces of old France, thirty-six in number, represented separate feudal entities, much as the English counties did (sec. 836). The towns, on the other hand, in the central and northern portions of France at least, represented nothing but grants of privilege, were nothing but communities which had been given a special and exceptional place in the feudal order. The assemblies of the provinces, accordingly, were not primary or democratic like those of the towns, but were made up *by 'estates,'* — models for the States-General which appeared in 1302 (secs. 374, 375).

369. The provincial Estates were probably in their origin nothing else than normal feudal councils, made up, as they were, of representatives of all who possessed corporate or individual privileges, whose judgments and advice feudal dukes and counts found it redound to their greater peace and welfare to hear and heed.

370. In several of the provinces, as, notably, in Languedoc and Brittany, these provincial Estates continued to meet and to

exercise considerable functions down to the time of the Revolution. Such provinces came to be distinguished from the others as *pays d'états* (provinces having Estates), and it is largely from the privileges of their assemblies that we argue the general nature of the powers possessed by those which had passed out of existence before history could catch a glimpse of them. We see the Estates of the *pays d'états* clearly only after the royal power has bound together all the provinces alike in a stringent system of centralization; they sit only at the king's call; their resolutions must be taken in the presence of the king's provincial officers and must await the regal sanction; they live by the royal favor and must in all things yield to the royal will. Nevertheless their privileges were still so substantial as to make the *pays d'états* the envy of all the rest of France. They bought of the Crown the right to collect the taxes demanded by the central government; they retained to the last the right to tax themselves for the expenses of local administration and to undertake and carry through entirely without supervision the extensive improvements in roads and watercourses to which the local patriotism bred by local self-government inclined them. Restricted though their sphere was, they moved freely within it, and gave to their provinces a vitality and a prosperity such as the rest of France, administered, as it was, exclusively from Paris, speedily and utterly lost.

371. **Territorial Development of the Monarchy.** — The process of the organic development of the monarchy which centred in the duchy of France began with territorial expansion and consolidation. For eight centuries that expansion and consolidation went steadily on; but its successful completion was assured before the extinction of the first, the direct, line of Capets in 1328. Before that date Philip Augustus had wrung Normandy from England and had added Vermandois, Auvergne, Touraine, Anjou, Maine, and Poitou to the dominions of his Crown, and his successors had so well carried forward the work of expansion that before the Valois branch came into the succession only Flanders, Burgundy, and Brittany broke the solidity of the French power in the north, and only Aquitaine, still England's fief, cut France off from her wide territories in the southeast. It had been the mission of the direct line of the Capets to lay broadly and irre-

movably the foundations of French unity and nationality, and they had accomplished that mission. They gave to their monarchy the momentum which was afterwards to carry it into full supremacy over Brittany, Aquitaine, and Burgundy, over the Rhone valley, and over the lands which separated her from the Rhine.

372. **The Crusades and the Monarchy.** — The monarchy, even more than the towns (sec. 363), profited by the effects of the crusades on the feudal nobility. So great was the loss of life among the nobles, so great was their loss of fortune, that they fell an easy prey to the encroaching monarchy. During the first crusades the French kings stayed at home and reaped the advantages which the nobles lost; during the last crusades, the kings were strong enough themselves to leave home and indulge in the holy warfare in the East, without too great apprehension as to what might happen to the royal power in their absence.

373. **Institutional Growth.** — Of course along with territorial expansion there went institutional growth: and this growth involved in large part the destruction of local liberties. The amalgamation of France into a single, veritable kingdom was vastly more fatal to local self-government than the anarchy and confusion of feudal times had been. The cities could cope with neighbor lords; and during the period of contest between king and barons they could count oftentimes upon assistance from the king: his interests, like theirs, lay in the direction of checking baronial power. But when the feudal lords were no longer to be feared, the towns in their turn felt the jealousy of the king; and against his overwhelming power, when once it was established, they dared not raise their hands. The ancient provinces, too, had in the earlier days found ways of bringing local lords into their Estates, in which the right of the burghers to have a voice in the government was recognized (sec. 368). But they could no more resist the centralization determined upon by a king triumphant over all feudal rivals than the towns could. In the end the provincial assemblies, where they managed to exist at all in the face of the growing power of the Crown, were, like all other independent authorities of the later time, sadly curtailed in privilege, and at the last almost entirely lost heart and life.

374. **The States-General.** — At one time, indeed, it seemed as

if the nation, in being drawn close about the throne, was to be given a life of its own in a national parliament. Philip the Fair (1285–1314), bent upon making good his authority against the interference of the Pope in certain matters, bethought himself of calling representatives of the nation to his support. The kings of France had already often taken the advice upon public affairs of the baronage or of the clergy, each of which orders had a corporate existence and organization of its own, and therefore possessed means of influential advising: but Philip called in the burghers of the towns also and constituted (1302) that States-General (*États-Généraux*) in which for the first time in French history that 'third estate' of the Commons appears which in later times was to thrust both clergy and nobles out of power and itself rule supreme as 'the people.'

375. **Character of the States-General.** — The first States-General, summoned by Philip the Fair, reminds one not a little of the parliament called together in England in 1295 by Edward I. (secs. 848, 850). Apparently France was about to have a parliament such as England's became, a representative body, speaking, and at the end of every important contest bringing to pass, the will of the nation. But for France this first promise was not fulfilled. During three centuries, the fourteenth, fifteenth, and sixteenth (1302–1614), it was the pleasure of the French monarch to keep alive, at first by frequent, and later by occcasional summons, this assemblage of the three Estates. This was the period during which feudal privileges were giving way before the royal prerogative, and it was often convenient to have the formal sanction of the Estates at the back of acts of sovereignty on the part of the Crown. But after the full establishment of the regal power the countenance of the Estates was no longer needed, and was no longer asked. The States-General never, moreover, even in the period of their greatest activity, became a legislative authority. For one thing, they had not the organization proper, not to say necessary, for the exercise of power. The three Estates, the Nobility, the Clergy, and the Commons (*Tiers État*), deliberated apart from each other as separate bodies; and each submitted its own list of grievances and suggestions to the king. They acted often in harmony, but never in union; their only

common meeting was the first of each session, when they all three assembled in the same hall to hear a formal opening speech from the throne. They never acquired the right to be consulted with reference to that cardinal affair of politics, taxation; they never gained the right to sit independently of royal summons. They were encouraged to submit what suggestions they chose to the government concerning the administration of the kingdom; and, as a matter of fact, their counsels were often heeded by the king. But they never got beyond advising: never won the right to expect that their advice would be taken. Their sessions did, however, so long as they continued, contribute to keep alive a serviceable form of self-government which at least held the nation within sight of substantial liberties; and which, above all, secured national recognition for that 'third estate,' the people, whose sturdiest members, the burghers of the towns, were real representatives of local political life.

376. **Administrative Development.** — Of course along with the territorial expansion of the monarchy by annexation, absorption, and conquest there went also great administrative developments. As the monarchy grew, the instrumentalities of government grew along with it: possession and control advanced hand in hand.

377. **Growth of the Central Administration.** — In the earlier periods of the Capetian rule a Feudal Court and certain household officers constituted a sufficient machinery for the central administration. There was a *Chancellor*, who was the king's private secretary and keeper of both the public and the private records of the court; a *Chamberlain*, who was superintendent of the household; a *Seneschal*, who presided in the king's name and stead in the Feudal Court, and who represented the king in the direct administration of justice; a *Great Butler*, who was manager of the royal property and revenues; and a *Constable*, who was commander of the forces. The Feudal Court, composed of the chief feudatories of the Crown, exercised the functions of a tribunal of justice in suits between tenants *in capite*, besides the functions of a taxing body and of an administrative council (secs. 228, 229, 237, 238).

378. **The Council of State.** — So long as 'France' was only a duchy and the real territory of the Crown no wider than the im-

mediate domain of the Capetian dukes, the weight of administration fell upon the officers of the household, and the Feudal Court was of no continuous importance. But as France grew, the household officers declined and the Feudal Court advanced in power and importance. As the functions of the Court increased and the Court became a directing Council, the Council more and more tended to fall apart into committees, into distinct sections, having each its own particular part of the duties once common to the whole body to perform. The earlier Councils exercised without distinction functions political, judicial, and financial, and their differentiation, though hurried forward by monarchs like Louis IX., was not given definite completeness until 1302 (the year of the first States-General) when, by an ordinance of Philip the Fair, their political functions were assigned to the body which was to retain the name Council of State, their judicial functions to a body which was to bear the ancient name of parliament (and which we know as the Parliament of Paris), their financial functions to a Chamber of Accounts. Alongside of the Chamber of Accounts there sprang up a Chamber of Subsidies which concerned itself with taxation. Into these bodies, whose activity increased from year to year, the old officials of the household were speedily absorbed, the Great Butler, for instance, becoming merely the president of the Chamber of Accounts.

379. **The Parliament of Paris.** — The judicial section of the Council of State consisted at first like the other sections, like the whole Council indeed, of feudatories of the Crown, as well as of administrative experts gradually introduced. More and more, however, this chief tribunal tended to become exclusively a body of technical officials, of trained jurists and experienced lawyers, the law officers and advisers of the Crown.

380. **Growth of Centralized Local Administration: Louis IX.** — This expansion of the central organs of administration meant that the royal government was entering more and more extensively into the management of affairs in the provinces, that local administration was being centralized. This extension of centralized local administration may be said to have begun in earnest under Louis IX. Louis IX. did more than any of his predecessors to strengthen the grip of the monarchy upon its

dominions by means of direct instrumentalities of government. He was a man able to see justice and to do it, to fear God and yet not fear the Church, to conquer men not less by uprightness of character than by force of will and of arms; and his character established the monarchy in its power. By combined strength and even-handedness he bore down all baronial opposition; the barons subjected to his will, he sent royal commissioners throughout the realm to discover where things were going amiss and where men needed that the king should interfere; he established the right of appeal to his own courts, even from the courts of the barons, thus making the Parliament of Paris the centre of the judicial system of the country; he forced limitations of power upon the feudal courts; he forbade and in part prevented judicial combats and private warfare. He drew the administration of the law in France together into a centralized system by means of royal *Baillis* and *Prévôts,* whom he subordinated to the Parliament of Paris.

381. **Steps of Centralization.** — It is not, of course, to be understood that Louis' work was to any considerable extent a work of creation: it was not, but rather a work of adaptation, expansion, systematization. The system which he perfected had been slowly growing under his predecessors. A *bailli* was, in the Middle Ages, a very common officer, representing king or seigneur, as the case might be, administering justice in his name, commanding his men-at-arms, managing the finances, caring, indeed, for every detail of administration. At first, it is said, "all of judicial, financial, and military administration was in his hands." It was an old system of royal *baillis*, set over districts known as *bailliages* (bailliwicks), that Philip Augustus instituted (1190) and Louis IX. extended and regulated, keeping an eye to it, the while, that the *baillis* should be made to feel their dependence upon the Crown so constantly that they should *per force* remain officials and not dream of following the example of dukes and counts and becoming independent feudal lords on their own accounts.

382. **Personal Government: Louis XIV.** — Such measures naturally tended to subordinate all local magnates to the king. By the policy of Louis XIV. this tendency was completed: the whole of the nobility of France were, so to say, merged in the person and court of the king. Louis took care to have it understood that no man who remained upon his estate, who did not dance constant attendance upon his majesty, the king, at his court, to add to its brilliancy and servility, might expect anything but disfavor and loss. He made of the great landed nobility a court nobility, turning men from interest in their tenants and their estates to

interest in court intrigue alone. He drew all men of rank and ambition to himself, merged them in himself, and left nothing between the monarchy and the masses whereby the terrible impact of the great revolution which was to come might be broken.

383. **The Completed Centralization: the Intendant.** — Finally came the completed centralization which followed the days of Richelieu: the system whose central figure was the *Intendant*, a direct appointee and agent of the king and absolute ruler within the province; and whose lesser figures were the sub-delegates of the Intendant, rulers in every district and commune. The rule of these agents of the Crown almost totally extinguished the separate privileges of the elected magistrates of the towns and of the other units of local government. In many places, it is true, the people were suffered still to elect their magistrates as before; but the usurping activities of the Intendant and his subordinates speedily left elected magistrates with nothing to do. In other cases elections ceased; the Crown sold the local offices as life estates to any one who would buy them for cash.

384. **The Province** was a military, not a civil, administrative district. The Provinces were grouped into *Generalities*, of which there were in all thirty-two, and it was over a *Generality* that each Intendant ruled. Ecclesiastical administration was served by still another distinct division into *Dioceses*.

385. **Judicial Centralization.** — The local tribunals of justice in like manner had their business gradually stolen from them. The principle of appeal established by Louis IX. at length worked its perfect work. Every case in which any interest cared for from Paris (and what interest was not?) was either actually or by pretence involved was 'evoked' to special courts set up by royal commission. No detail was too insignificant to come within the usurpations of the king's government.

386. **The Royal Council and the Comptroller-General.** — The Royal Council at Paris regulated, by 'orders in council,' every interest, great or small, in the whole kingdom. The Comptroller-General, acting through the Intendants and their sub-delegates, and through the royal tribunals, managed France. Everybody's affairs were submitted to him, and through him to the Royal Council; and everybody received suggestions from Paris touching

his affairs. No labor of supervision was too overwhelming for the central government to undertake. Interference in local affairs, made progressively more and more systematic, more and more minute and inquisitive, resulted, of course, in the complete strangulation of local government. All vitality ran to the veins of the central organism, and, except for the lingering and treasured privileges of the *pays d'états*, and for here and there a persistent form of town life, France lay in the pigeon-holes of a bureau. *Tabla rasa* had been made of the historical elements of local government.

387. **The Spirit of the Administration.** — This busy supervision of local and individual interests was always paternal in intent; and the intentions of the central power were never more benevolent than just when the Revolution was beginning to draw on apace. "The royal government was generally willing in the latter half of the eighteenth century to redress a given case of abuse, but it never felt itself strong enough, or had leisure enough, to deal with the general source from which the particular grievance sprang." [1]

388. **The Revolution.** — This whole fabric of government went for a moment to pieces in the storm of the Revolution. But the revolutionists, when their stupendous work of destruction had been accomplished, were under the same necessity to govern that had rested upon the monarch whom they had dethroned and executed; and they very soon proved themselves unable to improve much upon the old patterns of government. In denial of the indefeasible sovereignty of the king, they proclaimed, with huzzahs, the absolute sovereignty of the people; but Assembly and Convention could do no more than arrogate all power to themselves, as the people's representatives, and seek to reign in the king's stead through the king's old instrumentalities. They gave voice to a new conception, but they could not devise a new frame of administration. The result was confusion, Committees, the Terror, and — Napoleon.

389. **The Reconstruction by Napoleon.** — The Revolution removed all the foundations of French *politics*, but scarcely any of the foundations of French *administration*. The interests of the

[1] John Morley, *Miscellanies*, Vol. II. (last Macmillan edition), essay on "Turgot," p. 138.

royal administration had centred in the general government, rather than in its local parts, — in patronage, in the aggregate national power and prosperity, in finance. The true interests of republican government, on the other hand, centre in thorough local development: republican work, properly done, ought to tend to broaden and diversify administrative work by diversifying political life and quickening self-directive administrative agencies. But this the leaders of the Revolution neither saw nor could do; and Napoleon, whom they created, of course made no effort to serve republican development.

390. Napoleon simply reorganized despotism. In doing so, however, he did scarcely more than carry into effect the principal purposes of the Constituent Assembly. The legislation of that Assembly had sought, not to shatter centralization, but to simplify and systematize it; and it was this purpose that Napoleon carried out. For the Convention and Assembly, as representatives of the nation's sovereignty, he substituted himself; and then he proceeded to give to centralization a perfected machinery. The Convention and Assembly had endeavored to direct affairs through Committees, Commissions, Councils, Directories, — through executive *boards*, in a word. For such instrumentalities Napoleon substituted single officers as depositaries of the several distinct functions of administration; though he was content to associate with these officers advisory councils, whose advice they might ask, but should take only on their own individual responsibility. "'To give advice is the province of several, to administer, that of individuals,' says the maxim which he engraved on the pediment of the administrative arrangements of France,"[1] to remain there to the present day. The Constituent Assembly, willing to obliterate the old Provinces of France, with their memories of feudal privilege, and the *Generalities*, with their ancient savor of absolutism, had redivided the country, as symmetrically as possible, into eighty-nine *Departments;* and it was upon this territorial framework that Napoleon superimposed a machinery of Prefects and sub-prefects, modelled, with simplifications and improvements of method, upon the system of Intendants and delegates of the old *régime*. This he accomplished in

[1] Marquardsen's *Handbuch*, Lebon's monograph on *France*, p. 78.

that celebrated "Constitution of the Year VIII." which still lies almost undisturbed at the foundation of French administration. The Revolution had resulted in imparting to centralization what it never had had before: namely, assured order and effective system.

391. Since the war between France and Germany in 1870–'1, the Departments of France have numbered only eighty-six, the loss of Alsace and Lorraine having subtracted three Departments.

392. **Advances towards Liberal Institutions.** — Nevertheless, the Revolution had asserted a new *principle* of rule, and every change of government which has taken place in France since the Revolution has pushed her, however violently, towards genuine representative institutions and real republicanism. Louis XVIII., though he persisted in holding to the divine right of kings and in retaining for himself and his ministers an exclusive right of initiative in legislation, assented to the establishment of a parliament of two houses and conceded to it the responsibility of the ministers. Louis Philippe abandoned the delusion of the 'divine right,' acknowledged the sovereignty of the people, and shared with the chambers the right of initiative in legislation. With Napoleon III. came reaction and a return to a system like that of the first Napoleon; but even Napoleon III. had consented to return to the practice of ministerial responsibility before the war with Germany swept him from his throne and gave birth to the present Republic.

393. **The Third Republic.** — Sedan having fallen (September 2), and the Emperor having been taken prisoner, the imperial government went to pieces, and on Sunday the fourth of September, 1870, the leaders of uneasy Paris proclaimed the Third Republic, Gambetta being their mouthpiece. A provisional government was at once set up by the republican leaders, under the name of the National Defence. The men who constituted it were fully aware that they legally represented nobody but themselves, that they had usurped power in the face of a national crisis and were acting by sufferance, and it was their purpose to call together a national assembly at once, an assembly chosen by universal suffrage, in order that the people's representatives might construct

in more formal fashion a government of their own. Immediate preparations were accordingly made for an election. But the rapid and fatal progress of the war prevented. Germany pressed her victories to the utmost. It was not possible to hold an assembly at all until the end had come and it had become necessary to decide terms of submission and peace.

394. **The National Assembly of 1871–1876.** — On the 8th of February, 1871, a National Assembly was elected, and on the 13th of the same month it convened for the transaction of its business at Bordeaux. It turned out not to be a republican body. Of its seven hundred and sixty-eight members a majority were found to be in favor of a monarchical form of government. Had that majority been united, it could have undone the work of Gambetta and his colleagues and have set a prince once more upon the throne of France. But it could not unite. Some, the 'Legitimists,' wished to see the old house of Bourbon restored; others were partisans of the house of Orleans; a few were Imperialists and wanted the empire of the Bonapartes set up again. The first business of the Assembly was easily disposed of, humiliating though it was. Peace was concluded with Germany upon her own terms, only Belfort being saved by the diplomacy of Thiers. The matter of real difficulty was the establishment and maintenance of a government. For the time being, and until something better and more permanent could be agreed upon, the name and the forms of the Republic were kept. M. Grévy, a moderate Republican, was made President of the Assembly; M. Thiers, a moderate Orleanist, was chosen 'Chief of the Executive Power' of the Republic (a title presently changed to President); and the Assembly itself undertook to direct affairs, through the President as its responsible agent.

395. **A Balance of Parties.** — For five years the Assembly maintained its authority and hold upon affairs. It had been given no formal commission at the elections what it should do. It had been clearly enough understood, of course, that it was first of all to come to terms of peace with Germany; but no one knew what the voters had expected it would do after that. It had neither been commissioned to form a government nor to conduct one, and yet it certainly had not been forbidden to do either. The Repub-

licans, finding themselves in a minority, urged that the Assembly had no authority to make a permanent constitution, and demanded that it should be dissolved and the people asked to choose a new assembly explicitly authorized to frame a government. The monarchical majority, however, feared that they should not have such another chance as the present to frame a government to their own liking, and claimed that as a National Assembly elected without instructions the existing body had practically received sovereign powers from the electors and might do as it pleased, watching, as prudent men should, the while, the temper of the country. The real difficulty was to hit upon a practicable programme, agreeable to all factions of the monarchists. The interests of the factions proved in fact irreconcilable and it soon became evident to conservative and observant men of every opinion that the Republic must be left standing. Thiers declared very frankly that he would have preferred a constitutional monarchy; but he believed a republic to be the real preference of the country, and he knew that to attempt the restoration of any one of the royal houses would be in the highest degree dangerous and revolutionary under the circumstances. "The Republic exists," he said; "it is the legal government of the country; to wish for anything else would be a revolution." The monarchists had at all events lost their opportunity by waiting; opinion ran steadily against them, and it was presently too late.

396. **The Framing of the Constitution.** — The more statesmanlike and practical men amongst them saw at last very clearly that they must frame a republican government or none at all; but they determined to do as little as possible towards making the constitution they should give it definitive and difficult of alteration. They would make the forms of the new government such that it could at any rate be readily changed, and that without radical amendment, into a constitutional monarchy. They gave it, accordingly, as simple and rudimentary a frame as possible, leaving almost every detail, and even some of the main arrangements of its administration, to be settled by ordinary legislation; and they took care to make constitutional change as easy and informal a matter as might be without risking immediate instability. For four years they experimented with the government they had:

defining the powers of the President and their own relations to him more than once, as if tentatively, and so as it were testing and shaping the arrangements to which they should ultimately give permanency. About a month after its convening the Assembly removed from Bordeaux to Versailles. While the Commune ruled Paris the leaders of the Assembly could of course think of nothing but the measures necessary to establish order and the authority of the government. When order had been restored, it was still necessary to handle the finances and arrange many disordered matters of administration. What with the difficulties of governing the country and the even greater difficulty of quieting its own factions, it proved impracticable for the Assembly to enter upon the work of constitution-making before 1873. The work was not completed before the closing months of 1875.

397. Meanwhile (August 31, 1871), by the same act which conferred upon him his new title of President of the Republic, the Assembly had defined its relations to Thiers, constituting him its responsible minister, with the right to appoint the other executive officers of the government and to address the Assembly upon all matters of public business, and giving him a term of office which should last until it should have finished its own business. In March, 1873, thinking him too dominant in its counsels, it had sought to exclude the President from its debates, except upon extraordinary occasions, and to put a responsible cabinet of ministers between itself and the head of the government. Two months later it forced M. Thiers to resign and elected Marshal MacMahon to exercise the office of President in his stead, fixing his term at seven years and leaving the scope of his authority and of his relations to the legislature to be determined by the definitive constitutional laws it was about to frame. It had experimented long enough at governing and at the making and modifying of Executives, and was ready, as it no doubt saw the country was, for its final task.

398. **Scope and Character of the Constitutional and Organic Laws of 1875.** — In framing the laws which were to give shape to the new government the Assembly distinguished between those which were to be 'constitutional' and subject to change only by special processes of amendment, and those which, though 'organic,' were to be left subject to change by the ordinary processes of statutory enactment by the two Houses of the Legislature. The 'constitutional' laws, passed February 24th and 25th and July

16th, 1875, respectively, dealt in the simplest possible manner with the larger features of the new government's structure and operation: the election and general powers of the President; the division of the National Assembly into two houses, a Senate and Chamber of Deputies; the general powers and mutual relations of the two Houses, the President's relation to them, and the general rules which should control their assembling and adjournment. Two 'organic' statutes, bearing date August 2nd and November 30th, 1875, respectively, provided for the election of Senators and Deputies. The only radical amendment of the 'constitutional' laws since then effected was made in August, 1884, when almost the whole of the constitutional law regarding the composition and powers of the Senate was repealed, and replaced by an 'organic' law (that is, an ordinary statute) which introduced a number of important changes, and left the organization and authority of the Senate henceforth open to the freest legislative alteration, likely to be checked only by the circumstance that the Senate must itself assent to the changes made. The 'organic' laws of 1875 with regard to elections to the Chamber of Deputies have been several times amended.

399. **The Sovereignty of the Chambers.** — There can be no doubt that the National Assembly had invested Marshal MacMahon with the presidential power, upon the resignation of M. Thiers in May, 1873, with a distinct purpose. MacMahon was at once a popular and patriotic soldier and a partisan of monarchy. It was hoped that he might keep the chief executive place of the nation warm for some sovereign to be afterwards agreed upon and enthroned, — not necessarily by *coup d'état:* perhaps by a mere modification of the constitutional laws with regard to the person and powers of the head of the state. Sovereignty, nevertheless, passed under the new constitution to the new National Assembly, the Senate and Chamber of Deputies. The 'constitutional' laws of 1875 can be changed at will by the legislature which they called into existence: changed by the simple substitution of action in joint Assembly for the ordinary separate action in two houses. The Senators and Deputies have but to unite in National Assembly to become as sovereign as the Assembly which created them (see sec. 411). They are, besides, the sole judges of their own

constitutional powers. No courts restrain them. France, like England, vests in her parliament a complete sovereignty of discretion as to its own acts.

400. The principal difference between the two cases is, that the English Parliament may exercise all its powers in the same way, by the ordinary procedure of enactment, whether it changes by the act a mere detail of the common law or a chief arrangement of the constitution of the realm, while the French chambers are put under limitations of procedure in respect of every alteration of the fundamental law.

401. The constitutional arrangements thus effected have this admirable difference from all other previous constitutions France has had since the Revolution: they do not pretend to constitute the whole body of her fundamental public law. They exclude neither precedent nor growth. In practice even the precedents of previous constitutions have been suffered to have a part in supplementing them. So much of former constitutional usage as is not incompatible with the laws and character of the Republic is regarded as still in force. There has been no absolute break with the past, but only a new construction on old foundations.

402. **The Chamber of Deputies.** — It was the hope of the constitution-makers of 1875 that the Senate would have equal weight in affairs with the Chamber of Deputies; but that hope has been disappointed. Effective power has fallen from the first to the popular chamber, and the Senate has been thrust into a secondary rôle. Of the choice of members of the Chamber of Deputies, the constitutional laws say no more than that they shall be elected by universal suffrage. 'Organic' statute law has organized the Chamber on the basis of one deputy to every seventy thousand inhabitants. Deputies must be at least twenty-five years of age, and their term, unless the Chamber be sooner dissolved, is four years. The eighty-six Departments into which the country is divided are the basis of representation in the Chamber, as in the Senate (sec. 406). To each Department is assigned a certain number of deputies, according to its population; every Department, however, whatever its population, being entitled to at least three representatives. The deputies are elected, not 'at large' for the whole Department, that is, on a general ticket, but by districts, as members of our federal House of Representatives

are chosen in the States (sec. 1286). The *Arrondissements* serve as 'congressional districts,' as we should call them, — and this method of voting is accordingly known in France as *scrutin d'arrondissement* (ballot by arrondissement).

403. This was the original arrangement of 1875; but in 1885 the system of voting for deputies in each Department on a general ticket, as we vote for presidential electors in the States, was introduced, being called *scrutin de liste* (ballot by list). It was adopted at the suggestion of Gambetta, who thought that a system of general tickets would give his party a freer sweep of popular majorities. In 1889, however, *scrutin d'arrondissement* was reëstablished, because *scrutin de liste* had given too free a sweep to the popular majorities of General Boulanger.

404. The principal colonies, too, are entitled to representation in the Chamber. Algiers sends five deputies; Cochin-China, Guadaloupe, Guyana, India, Martinique, Réunion, and Senegal each send one. All counted, there are five hundred and eighty-four deputies. Elections to the Chamber do not take place at regular intervals and on fixed dates named by statute, but must be ordered by decree from the President of the Republic in each case. The law directs, however, that the President must order an election within sixty days, or, in case of a dissolution, within two months after the expiration of a term of the Chamber; and that the new Chamber must come together within the ten days following the election. At least twenty days must separate decree and day of election.

405. **Election by Majority.** — The law governing the election of Deputies provides against choice by plurality on the first ballot; and the result is unfortunate. If there are more than two candidates in an electoral district (an *arrondissement*), an election on the first ballot is possible only if one of the candidates receives an absolute majority of all the votes cast not only, but also at least one-fourth as many votes as there are registered voters in the district. If no one receives such a majority, another vote must be taken two weeks later, and at this a plurality is sufficient to elect. The result is, that the multiplication of parties, or rather the multiplication of groups and factions within the larger party lines, from which France naturally suffers overmuch, is directly encouraged. Rival groups are tempted to show their strength on the first ballot in an election, for the purpose of winning a place or exchanging favor for favor in the second. They lose nothing by failing in the first; they

may gain concessions or be more regarded another time by showing a little strength ; and rivalry is encouraged, instead of consolidation. France cannot afford to foster factions.

406. **The Senate.** — By an act of the National Assembly passed August 14th, 1884, almost the whole of the constitutional law of February 24th, 1875, relating to the organization of the Senate and to the qualifications and election of senators was stripped of its 'constitutional' character and became an ordinary statute. Four months later it was replaced by the act of December 9th, 1884. In all that respects its organization and in much that respects its powers the Senate has become a merely statutory body. So far as the 'constitutional' laws are concerned, it might be constituted by executive appointment or by lot. By statute it has been made to consist of three hundred members chosen by 'electoral colleges' specially constituted for the purpose in the several Departments and colonies, and the term of senatorship has been fixed at nine years. Forty years has been declared the minimum age for senators. The electoral college for the choice of senators is composed in each Department of the deputies from the Department, the members of the 'General Council' of the Department (sec. 447), and the members of the Councils of its several Arrondissements (sec. 455), together with delegates chosen in each Commune by the Communal Council from among the qualified voters of the Commune (sec. 464). One-third of the membership of the Senate is renewed every three years. In legal powers the Senate is in all respects upon a footing of equality with the Chamber of Deputies, except that money bills must originate with the Chamber; and though it has in practice been conceded that the Senate may amend them, it has been doubted whether it can of strict legal right add to money bills. In political power, of course, the Chamber overshadows and dominates the Senate.

407. Until 1884 the law provided that seventy-five of the senatorial seats were to be filled by the choice of the Senate itself, and held for life. By virtue of the constitutional change effected in 1884, all vacancies occurring in these life-memberships are now filled by election in the Departments, as other seats are, and for the usual term of nine years. This process will in time, of course, do away with all life-membership.

408. Legislation determines from time to time how many senators shall be elected by each Department. According to the present distribution ten are returned by the city of Paris, which itself constitutes the Department of the Seine. Other Departments vary in their representation from two to eight. "The following elect one senator each: the Territory of Belfort, the three Departments of Algeria, the four colonies, Martinique, Guadaloupe, Réunion, French Indies." (Law of Dec. 9, 1884.)

409. **In Case of Usurpation.** — In case the Chambers should be illegally dissolved or hindered from assembling, the General Councils of the Departments are to convene without delay in their respective places of meeting and take the necessary steps for preserving order and quiet. Each Council is to choose two delegates to join delegates from the other Councils in assembling at the place whither the members of the legal government and the regular representatives of the people who have escaped the tyranny have betaken themselves. The extraordinary assembly thus brought together is authorized to constitute itself for business when half the Departments shall be represented; and it may take any steps that may be necessary to maintain order, administer affairs, and establish the independence of the regular Chambers. It is dissolved, *ipso facto*, so soon as the regular Chambers can come together. If that be not possible, it is to order a general election, within one month after its own assembling.

410. **The National Assembly: its Functions.** — The Senate and Chamber of Deputies meet together in joint session as a National Assembly for two purposes: the revision of the Constitution and the election of the President of the Republic. Since November, 1879, the Houses have met for the performance of their ordinary legislative functions in Paris; as a National Assembly they meet in Versailles, apart from the exciting influences of the great capital, which has led so many assemblies captive. Whether met for the election of the President or for the revision of the Constitution, the National Assembly must do the single thing which it has convened to do and then at once adjourn. For the election of the President there are clearly determined times and occasions: whenever the office of President falls vacant, whether by the death or resignation of the President or by the expiration of his term.

411. **Revision of Constitution.** — A revision of the Constitution may take place whenever the two Houses are agreed that revision is necessary. It has, thus far, been customary for the Houses to consider separately beforehand not only the propriety

of *a* revision, — that standing constitutional rules require, — but also the particular points at which revision is necessary and the lines on which it should proceed; and to know each other's minds on these important heads before agreeing to a National Assembly. Alike for the election of a President and for the adoption of constitutional amendments an absolute majority vote of the united Chambers suffices.

412. It might easily happen that the majority in one of the Houses would be outvoted on joint ballot in National Assembly. If such were likely to be the case, that majority could hardly be expected to consent readily to a joint session. France has, not two, but many national parties, and it is not always possible to effect the same combination of factions in support of a measure in both the Houses. Cases must frequently arise in which a joint vote of the Houses upon a particular measure would carry with it defeat to the policy preferred in one of them. And yet there is no legal obstacle to prevent the majority in a joint session taking up and deciding questions not agreed upon beforehand. The only guarantee is good faith.

413. The National Assembly is the most completely sovereign body known to the Constitution, there being but one thing it cannot do under existing law: it cannot sit as long as it pleases. Its sessions must not exceed in length the duration of an ordinary legislative session (five months). It is, indeed, forbidden, besides, to consider the repeal of republican government; but it could repeal the law which forbids it.

414. The officers of the Senate act as officers of the National Assembly. They consist of a President, four Vice-Presidents, six Secretaries, and four Quæstors, elected for one year. The Chamber of Deputies has the same offices, with the addition of two more secretaryships.

415. **The President of the Republic.** — The president, elected by the joint ballot of the Chambers, is titular head of the Executive of France. His term of office is seven years. He has the power of appointing and removing all officers of the public service. He has no veto on legislation, but he is authorized to demand a reconsideration of any measure by the Houses. He can adjourn the Chambers at any time (though not more than twice during the same session) for any period not exceeding one month; he can close a regular session of the Houses at his discretion after it has continued five months, and an extra session when he pleases; and

he can, with the consent of the Senate, dissolve the Chamber of Deputies, even before the expiration of the five months of its regular session. A dissolution of the Chamber of Deputies puts an end also to the sessions, though not to the life, of the Senate; for it cannot act, except as a court, without the Chamber. In the event of a dissolution, as has been said, the President must order a new election to be held within two months thereafter, and the Houses must convene within ten days after the election. "The President is responsible in case of high treason only," says the constitutional law of February 25th, 1875; and, in case of high treason the Chamber must impeach, the Senate try, him. As a matter of fact, however, four out of the six Presidents of the Republic have been forced or have chosen to resign. Not one has completed his full term of seven years: for Carnot was assassinated and Faure has been (1897) but two years in office.

416. The only limitation put by law upon the choice of the National Assembly in electing a President of the Republic is, that no one shall be chosen President who is a member of any family which has occupied the throne of France. Members of these families are also excluded from seats in either the Chamber or the Senate.

417. The President's power of dissolving the Chamber might, on occasion, be used to bar even the proceedings of the National Assembly. The consent of the Senate having been obtained, the President could dissolve the Chamber while the National Assembly was in session, and so deprive that body of two-thirds of its members, leaving it without that 'absolute majority,' lacking which it can take no authoritative action. Such a course would, however, be clearly revolutionary, — more revolutionary than any action of the Assembly that it might be used to prevent, — and would, though perhaps technically defensible, have no real sanction of law.

418. **Influence of President and Senate.** — The President and Senate, it will be seen, are given a really very great power of control over the Chamber of Deputies. It is within the choice of the President to moderate the excesses of the Chamber by returning bills to it for reconsideration, or by adjourning it during a period of too great excitement; and it is within the choice of the President and Senate acting together to appeal from its decisions to the constituencies by a dissolution. The Senate, moreover, has once and again been given so many members of real weight of character and distinction of career that it would seem to have been in a position to act in restraint of the Chamber with firmness and success. But, though the National Assembly which elected Thiers and MacMahon

and put together the framework of the constitution may have intended the new government to be in some real sense a government by the President, it has in fact never shown the President in any degree a master in affairs since the days of MacMahon himself. MacMahon exercised the power of dissolution, with the approval of the Senate; but the change of Deputies only taught him the real character of the government, as a government subject to the will of the Chamber. Year by year the subordinate position of the Senate and the irregular but always irresistible power of the Chamber have become more and more obvious. The later presidents have been men of so little commanding force and the Senate has played so timid a part in affairs that their position of advantage has been altogether sacrificed; and the unbridled license of the Chamber constitutes one of the chief menaces to the success and even to the existence of the Republic.

419. **The Cabinet and the Council of Ministers.** — *A Cabinet of ministers* constitutes a link between the President and the Chambers: and the political functions of this Cabinet are amongst the central features of government in France. It is to be carefully distinguished from the *Council* of ministers; both the Cabinet and the Council consist of the same persons; but the Cabinet is a political body exclusively, while the Council has only administrative functions. The distinction illustrates pointedly the double capacity of the ministers.

420. **The Ministries.** — There are now eleven ministers: the Minister of *Justice*, filling the office filled before the Revolution by the Chancellor; the Minister of *Finance*, who has taken the place of the Comptroller-General of ante-revolutionary days (sec. 386); the Minister of *War*, who acts as head of the administrative department created in the time of Mazarin (1644); the Minister of *Marine and the Colonies* (1644); the Minister of *Foreign Affairs* (1644); the Minister of the *Interior*, an office created by the Constituent Assembly in 1791, by a consolidation of the pre-revolutionary offices of Comptroller-General and Minister of the Royal Household, except so far as the functions of the Comptroller-General were financial and bestowed upon the Minister of Finance; the Minister of *Public Instruction* (1848), *Religion* (1848), *and the Fine Arts;* the Minister of *Public Works;* the Minister of *Agriculture* (an office created in 1812, but afterwards abolished, to be revived in 1828–30); the Minister of *Trade and Industry;* and the Minister of *Posts and Telegraphs.* These last two offices were created in 1848 by subtraction from the department of the Interior.

421. **The Cabinet.** — As a Cabinet, the ministers represent the Chambers. They are commonly chosen from amongst the mem-

bers of the Houses; but, whether members or not, they have, as ministers, the right to attend all sessions of the Chambers and to take a specially privileged part in debate. The same right extends also to the Under-secretaries of Finance, of the Interior, of the Colonies, and of Fine Arts, who are, consequently, usually members of the Chambers.

A minister may speak at any time in the Chambers; not even the *clôture* (previous question) can exclude him.

In 1888 the Minister of War was without a seat in the Chamber.

422. **The Council of Ministers.** — As an administrative Council the ministers are, in official rank at least, subordinate to the President, who is the Chief Executive. The Council sits in his presence, though not under his presidency, but under that of a special 'President of the Council' chosen by the ministers from amongst their own number. Its duty is to exercise a general oversight of the administration of the laws, with a view to giving unity of direction to affairs of state. In case of the death, resignation, or incapacitation of the President of the Republic, the Council is to act in his stead until the National Assembly can meet and elect his successor. Its members are *ex officio* members of the Council of State, the highest judicial tribunal of the Republic for the determination of administrative cases (sec. 468).

423. **Relation of the Ministers to the President.** — The Council of Ministers is a body recognized by law, the Cabinet is not: it is only the ministers in consultation concerning matters affecting their political responsibility: it is, aside from such meetings for consultation, only a name representing their union in responsibility. But the two names, Council and Cabinet, furnish convenient means for making plain the various relations of the ministers to the President. As a Council they are, in a sense, his creation; as a Cabinet they are, in a sense, his masters. The Executive Departments or Ministries over which they preside are the creation, not of the Constitution or of statutes, but of the President's decree. No decree of the President is valid, however, unless countersigned by the minister whose department is affected. Any such decree must, too, almost necessarily affect the budget, and must in that way come within the control of the ministers

and the Chambers. The ministers are the President's appointees; but he must appoint ministers who are in agreement with the majority in the Chambers, and they are responsible to the Chambers alone for their conduct in office. The President is the head of the administration; but his salary is dependent upon the annual budget which the Minister of Finance presents to the Chambers: and the items of the budget are matter of agreement between the ministers and the Chambers.

424. All these 'buts' are so many fingers pointing to the power of the Cabinet over the President. The Ministers are in fact not his representatives, but representatives of the Chambers. In this capacity they control not the policy only, but also the patronage of the government. Naturally the President's appointments, needing, as they do in every case, the countersignature of a minister, are in general the appointments of the ministers; and their appointments are too often bestowed according to their interest in the Chambers, — are too often used, in short, to be cast as bait for votes.

425. **The Patronage of Office**, indeed, threatens to become even more of a menace to good government in France than it has been to good government in our own country under the federal system of appointment. The number of offices in the gift of the ministers in France is vastly greater than the number within the gift of the President of the United States; and the ministers' need to please the Chambers by favors of any and all kinds is incomparably greater than our President's need to please Congress, since they are dependent upon the good-will of the Chambers for their tenure of office, while he is not dependent on Congress for his.

426. There have never yet been in France, however, any such wholesale removals from office upon the going out of one administration and the coming in of another as we have seen again and again in this country; because there has really been no radical change of administration in France since the days of MacMahon. In this country, as in England, there are two great national parties, and the government is now in the hands of one and again in the hands of the other. But in France a change of cabinet means nothing more than a change from the leadership of one group of Republicans to the leadership of another, — or, at most, a change from the leadership of Republicans to the leadership of Radicals, who are simply extreme republicans. In England we hear of "Her Majesty's Opposition": the party of the minority for the time being is known to be as patriotic, as much attached to the existing form of government, as safe to entrust power to, should it obtain a majority in the Commons, as the

party in office. But in France it is not so. Until very recent years, the only real party opposed to the Republicans was made up of persons known or suspected to be hostile to the very form of government under which the country is living. The people have never given it a majority in the Chamber, and have never been willing to entrust it with office. One group of Republicans, therefore, succeeds another; one faction goes out of office, another comes in. Generally a new cabinet, just come in, is composed in part of men who held office also in the cabinet just thrust out. It is a change only of chief figures. And so wholesale removals from office do not take place.

427. **Ministerial Responsibility.** — The responsibility of the ministers to the Chambers is of law, and not simply of custom as in England. Their tenure of office is dependent upon the favor of the Houses. It would doubtless be so without law, for no policy of theirs could succeed without legislative approval and support, and it is French precedent as well as English for ministers to resign when defeated. They resign because they will not carry out measures of which they disapprove. In theory their responsibility is to both Houses; but, as a matter of fact, it is only to the Chamber of Deputies. The votes of the Senate alone seldom make or unmake Cabinets; that has come to be recognized as the prerogative of the popular Chamber, which is more directly representative of the nation.

428. **Questions and Interpellations.** — The ministers may be held closely to their responsibility at every turn of their policy by means of various simple and effective forms of inquiry on the part of the Chambers. First of all is the direct question. Any member of either House may, after due notice given to the minister concerned, ask any question as to affairs of state; and an answer is demanded, by custom at least, to every question which can be answered publicly without detriment to the public interest. Next to the direct question, which is a matter between the individual questioner and the minister questioned, comes that broader form of challenging the policy of the Cabinet, known in France as the '*Interpellation.*' The simple questioner must first get the consent of the minister to hear his question; an *interpellation*, on the contrary, can be brought on without awaiting the acquiescence of the minister. It is a special and formal challenge of the policy or action of the Cabinet on some matter of the day, and is

commonly the occasion of a general debate. It usually results in a vote expressive of confidence or want of confidence in the ministers, as the case may be. It is the question exalted into a subject of formal discussion: it is the weightiest form of interrogating ministers: it makes them and all that they have done the objects of set attack and defence. A third and still more formal method of bringing administrative acts under the scrutiny of the Chambers consists in the appointment of a Committee of Investigation.

429. The power of interpellation has been so indiscriminately and unwisely used in France as seriously to discredit her system of cabinet government. The Chamber of Deputies is notoriously an intemperate body, and it seems constantly inclined to make of government a game at which it may match its wits with those of the ministers of the day. Interpellation is unhesitatingly used to take the ministers by surprise. Deputies lie in wait to take them at a disadvantage. They are 'interpellated,' moreover, most often, not upon questions of first-rate importance or in any way representative of their policy, but upon trivial matters of the moment. A sudden impulse upon a minor question of administration often determines the vote, and a cabinet goes out, it may be, as if by a trick, — not because its policy has been rejected or discredited, but because a chance and temporary majority has been got together against it. It is said that "out of the twenty-nine ministries that have resigned in consequence of a vote of the Chamber of Deputies since the cabinet has been made responsible, ten have fallen on account of orders of the day moved after an interpellation, or in course of a debate. Several of these orders covered, indeed, the general policy of the cabinet, but others had no such broad significance." (Lowell, I., 122.)

430. The ministers are, therefore, hardly more than nominally the leaders of the Chamber, holding their authority for brief periods and upon a very precarious tenure. For a little they represent a combination of Republican groups; they have almost never since the establishment of the Republic had a thoroughly homogeneous majority behind them. The Chamber treats them as if they were still the agents and appointees of a monarch, instead of its own representatives, and is jealous and suspicious of them at every turn. The system no doubt awaits for its successful operation the formation of two coherent national parties, capable of organizing for government instead of merely for rivalry.

431. **The Course of Legislation.** — All propositions alike, whether made by ministers or by private members, have to go to a special committee for consideration before reaching a debate and vote by

the whole House; but the propositions of private members must pass another test before they reach even a special committee. They must go first to the 'Monthly Committee on Parliamentary Initiative,' and it is only after hearing the report of that Committee upon bills submitted to it that the House determines whether particular measures shall be taken under further consideration and advanced to the special-committee stage. A vote of emergency taken upon the introduction of a measure can, however, rescue a ministerial bill from all committee handling, and a private member's bill from the delays of the Initiative Committee.

432. **The Committees.** — The committee organization of the House is worthy of special remark. Every month during the session, the members of the Chamber of Deputies are divided by lot into eleven, those of the Senate into nine, *Bureaux*. These Bureaux select four 'monthly committees,' one on 'Leave,' one on 'Petitions,' one on 'Parliamentary Initiative,' and one on 'Local Interests,' and one annual committee on the Budget, — each Bureau contributing its member or members. The Bureaux select, moreover, all the special committees to which bills are referred, except when the House prefers itself to elect a committee; and they themselves consider matters referred to them.

433. It will be seen that this arrangement, making the composition of the Bureaux dependent upon lot, as it does, and providing for the monthly reconstitution alike of the Bureaux and of the committees which they select, must effectually prevent the recognition or maintenance of party lines in the formation either of the Bureaux or of the committees, and seems in that way very well adapted to check the factional ardors of the Chamber. But the very existence of committees and of the matter-of-course reference of all measures to their consideration, means that the Chamber insists upon examining and sifting all proposals for itself, whether they have been introduced by the ministers or not. It means, consequently, that the leadership of the ministers is thus still further broken and embarrassed. The committees will always insist upon putting some touch at least of their own handiwork upon the bills submitted to them; and even the ministers may count upon seeing their proposals pulled about and altered.

434. **The Budget Committee.** — All financial matters are considered by special standing committees chosen for one year; in

the Chamber of Deputies by a Budget Committee composed of thirty-three members, and in the Senate by a Finance Committee composed of eighteen members; and these Committees, like other standing committees, arrogate to themselves something like absolute domination of the financial policy of the government, with the result of robbing financial legislation of order and consistency, and of sadly obscuring the responsibility of the ministers. Other committees simply consider and report; the Budget Committee undertakes often radically to revise, sometimes altogether to transform, ministerial proposals, originating when it was meant only to control.[1]

435. **Government by the Chambers.** — Ministerial responsibility has rapidly degenerated in France, during the past few years, into government by the Chambers, or, worse still, government by the Chamber of Deputies. Ministerial responsibility is compatible with ministerial leadership; and under a ministry really given leave to direct the course of public policy, the Chambers judging and controlling but not directing, that policy might have dignity, consistency, and strength. But in France the ministers have, more and more as the years of the Republic have multiplied, been made to substitute for originative leadership submissive obedience, complete servility to the wishes, and even to the whims, of the Chamber of Deputies. The extraordinary functions which have been arbitrarily assumed by the Budget Committee simply mirror the whole political situation in France. The Chamber has undertaken to govern, with or without the leadership of ministers. So capricious, so wilful has it been in its rejection of every minister who would not at once willingly serve its moods, so impatient indeed of all real ministerial leadership, that almost every public man of experience and ability in France has now been in one way or another discredited by its action; and France is staggering under that most burdensome, that most intolerable of all forms of government, *government by mass meeting*, — by an inorganic popular assembly. It is this state of affairs which has once and again called forth so loud a demand for a revision of the Constitution, and which has seemed upon at least one notable occasion to create an opportunity for another return to some sort of dictatorship.

436. **The Administrative and Judicial Powers of the Executive.** — It must not be supposed, because the life of a ministry is short and its leadership in the houses uncertain, that it wholly lacks power while it lasts. It inherits the traditional prerogatives of the

[1] See the *Revue des Deux Mondes* for Nov. 1, 1886, p. 226 *et seq.*

French Executive, and they are very great. The powers of the President are the powers of the ministers. His power to execute and administer the laws means, according to the immemorial practice in France, that he may not only freely interpret the laws but may also supplement them to meet circumstances and cover cases which the legislature did not foresee or provide for. He may not disregard the plain principles of the law, indeed, but he need not be restrained by its detail; and in shaping administrative arrangements, instructing officials, and developing plans to meet the requirements of public business the executive authority exercised by the ministers through the President's decrees is in most cases wholly free from the trammels of statute. The Executive is expected to shape the laws to the cases that arise, and to supplement them where they lack completeness. The laws are, accordingly, for the most part themselves without detailed provisions. They give the officers of state who are to execute them a principle by which to go rather than a body of minute instructions. The legality of administrative action, moreover, is tested, when challenged, not by the ordinary courts of law, in which private rights are determined and guarded, but by special administrative tribunals in which the utmost latitude of discretion on the part of officers of state is the principle chiefly respected and enforced. The Executive inherits a very absolute tradition of power.

437. The President's power to 'dispose of the armed force' of the nation has been employed in such a way as almost to amount to a declaration of war, in some of the aggressive colonial schemes into which recent French ministries have allowed themselves to be drawn. There goes with the executive power of appointment, too, an absolute power of removal from office, and all the vast official machinery of a centralized state is under the hands of the ministers to use almost as they will.

438. **Departmental Functions.** — The main duties of most of the Departments are sufficiently indicated by their names. The *Ministry of Justice* controls the administration of civil, criminal, and commercial law; in other words, is set over the judicial system of the country. Not over the whole of it, however. The strict differentiation of functions insisted upon in France assigns to the Ministry of War, the Ministry of Marine, and the Minis-

try of the Interior respectively, the administration of military, marine, and administrative law. The *Ministry of Foreign Affairs* controls the relations of France with foreign countries. The *Ministry of the Interior* undertakes all duties not assigned to any other executive Department. That of *Finance* collects, handles, disburses, and accounts for the revenues of the state. That of *War* directs all military affairs. That of *Marine and the Colonies* has, added to the duty of managing the navy, the duty of acting for the colonies as all departments in one. The *Ministry of Public Instruction, Religion, and the Fine Arts* organizes and oversees education, from the primary schools up to the University, mediates between church and state, buys works of art for the state, directs the public art-schools, museums, and art-exhibitions, subsidizes the theatres, exercises a censorship over the drama, superintends conservatories and schools of music and oratory, and supervises the state manufactories of Sèvres ware and tapestry. The *Ministry of Public Works* is entrusted with the management of the public highways, including the railways, and of the state mines, with the inspection of shipping and the care of seaports and lighthouses, and with the direction of the schools of engineering and architecture. The *Ministry of Agriculture* is charged with the care of the forests, the proper irrigation of the country, oversight and assistance in the breeding of live-stock, sanitary regulations with reference to cattle diseases, and the administration of the various aids given by law to agriculture. The *Ministry of Trade and Industry* undertakes to provide for the interior commerce of the country the facilities afforded by special courts of law, bourses and chambers of commerce, duly commissioned middle-men and factors, life-insurance companies, savings banks, and accident funds, the official examination and warranty of certain classes of manufactured goods, the policing of markets, and the granting of patents and trade-marks; for the foreign commerce of the country, it regulates duties and imposts, offers premiums for shipbuilding and seamanship, and collects statistics. A special 'Bureau of Industrial Societies' was added to this Department in 1886. The *Ministry of Posts and Telegraphs* sees to the carrying and delivery of the mails, and to the telegraphic service of the country.

439. The duties of most of these ministries illustrate the range of function assumed by the government in France (secs. 1479, 1480) more conspicuously than they illustrate the form and spirit of her political institutions. A mirror of the political life of France is to be found in the organization of the Ministry of the Interior, which is more largely concerned than any other Department with the multifarious details of local government.

Local Government.

440. France still preserves the administrative divisions created by the Constituent Assembly in December, 1789. Instead of the old system of ecclesiastical dioceses, military provinces, and administrative 'generalities' (sec. 385), with their complexities and varieties of political regulation and local privilege, there is a system, above all things simple and symmetrical, of *Departments* divided into Arrondissements, *Arrondissements* divided into Cantons, and *Cantons* divided into *Communes*. Much the most significant of these divisions is the Department: whether for military, judicial, educational, or political administration, it is the important, the persistent unit of organization; arrondissement, canton, and commune are only divisions of the Department, — not fractions of France, but only fractions of her Departments. The canton, indeed, is little more than an election district; and the arrondissement is only a fifth wheel in the administration of the Department. The symmetry of local government is perfect throughout. Everywhere the central government superintends the local elective bodies; and everywhere those bodies enjoy the same privileges and are hedged in by the same limitations of power.

441. The several parts of the system of local government in France will thus be seen to rest, not upon any historical groundwork, creating each a vital whole, with traditions of local self-government handed down from an older time of freedom, but upon a bureaucratic groundwork of system. If, therefore, France is now approaching confirmed democracy and complete self-government, as there is good reason to believe she is, she is building, not upon a basis of old habit, fixed firmly in the stiff soil of wont

and prejudice, but upon a basis of new habit widely separated from old wont, depending upon the shifting soil of new developments of character, new aptitudes, new purposes. Her new ways run across, not with, the grain of her historical nature. Her self-government is a-making instead of resting upon something already made.

442. **The Department: the Prefect.** — The central figure of French administration is the Prefect, the legal successor of the Intendant (sec. 384). He is the agent of the central government in the Department. He is the recruiting officer of that district, its treasurer, its superintendent of schools,[1] its chief of police, its executive officer in all undertakings of importance, and the appointer of most of its subordinate officials. He fills a double capacity: he is the agent and appointee of the central government, and at the same time the agent of the local legislative authorities. He is at once member and overseer of the General Council of his Department; and he is necessarily its agent, inasmuch as he commands, as representative of the authorities in Paris, all the instrumentalities through which its purposes must be effected. A minister can veto any act of a Prefect, — for he is the representative of any minister who needs his executive aid in the Department, — but no minister can override him and act by his own direct authority. Until he is dismissed the minister must act through him.

443. When acting as the agent of the central authorities in carrying out the provisions of general statutes or of general administrative regulations the Prefect has, of course, no choice but to obey the orders he receives from the ministers in Paris. But when he acts in local matters, he may use his own discretion and can be brought to book only by judicial process and upon complaint. It is of great consequence, therefore, that his powers in the field of local government are so many and so important. He prepares the budget of the Department not only but also all the other business upon which the General Council of the Department (secs. 447–452) is expected to act. His initiative determines the greater part of what that Council does; and it can act only through him in getting its resolutions carried into effect. His police

[1] He appoints and disciplines the teachers.

power extends beyond the organization and government of the police of the Department to the, at any rate, indirect control of the police organization and the police regulations of the Communes, many of which are great cities, with elective officers of their own (sec. 458). Every mayor's police appointments must be confirmed by him, and he alone can remove police officials from office in the Communes. 'Police' affairs, in France, moreover, cover not merely the preservation of order and the enforcement of the law, but also such important matters as those, for example, which concern the public health. In respect of some matters of local management, too, the Prefect can act by direct orders of his own, addressed to the officials of the Communes, as if to his own immediate subordinates. He can in his discretion suspend the mayor of a Commune from office for a month's time; he can suspend also the session of a communal council (sec. 464) for a like period.

444. The Prefect may take part in the proceedings of the General Council of the Department at any time except when his accounts are being considered.

445. Such is the legal position of the Prefect. His actual position is somewhat different. The politics of the Republic, one of whose tendencies has been to contribute by degrees to local self-government, is making the Prefect more and more largely the executive agent of the General Council of his Department; and has, moreover, already made his office a party prize. He is appointed by the Minister of the Interior and is in law first of all and chiefly the representative of the Interior. But the other ministers also, as has been said, act through him in many things. The result is that his office is often emptied and filled again upon a change of ministers, — a change, that is, of the ruling group in the Chamber. He frequently owes his appointment to the favorable influence of the deputies and senators from his Department with the Minister of the Interior and he is kept, by his personal relations with them, close to local influences. He is, consequently, not the autocrat he was under Napoleon. He is, rather, the trimmer to local opinion too often found under popular governments.

446. **The Spoils System in France.** — French administration in all its branches, indeed, and in all grades of its service, from the lowest to the highest, has suffered profound corruption through the introduction of the fatal idea that public office may and should be used as a reward for party or personal services. Ministers have adopted, all too readily, the damning practice of distributing offices among their party followers as pay for party activity, and even among the friends and constituents of deputies,

in exchange for support in the Chamber. And of course, when short of gifts to bestow, the temptation is to empty as many offices as possible of opponents or luke-warm friends in order to have places to give away. This policy is likely to be doubly fatal to good government in France because of the very frequent changes of ministry at present characteristic of her politics. (Compare secs. 426, 427.)

447. **The General Council of the Department.** — The legislative body of the Department is the General Council, which is made up of representatives chosen, one from each canton, by universal suffrage. Except during a session of the Chambers, the President of the Republic may at any time dissolve the General Council of a Department for cause. The election of representatives to the General Council, like the election of deputies, does not take place upon days set by statute, but on days set by decree of the President. Councillors are elected for a term of six years, one-half of the membership of the Council being renewed every three years. In order that members of the General Council may be in fact representatives of at least a respectable number of the voters of the cantons, the law provides, as in the case of the election of Deputies (sec. 406), that no one shall be elected on a first ballot unless voted for on that ballot by an absolute majority in a poll of at least one-fourth of the registered voters. Attention having been called to the election by the failure of a first ballot, a plurality will suffice to elect on a second. In case of a tie, the *older* candidate is to be declared elected.

448. The membership of the Council varies in the several Departments, according to the number of cantons, from seventeen to sixty-two.

449. The General Council is judge of the validity of elections to its own membership; but it is not the final judge. An appeal lies from its decisions to the Council of State. A seat may be contested on the initiative either of a member of the Council, the Prefect, or a constituent of the member whose rights are in question.

450. There are two regular sessions of the General Council each year. The duration of both is limited by law: for the first to fifteen days, for the second to one month. Extra sessions of eight days will be called by the President of the Republic at the written request of two-thirds of the members. If the Council in any case outsit its legal term, it may be dissolved by the Prefect;

if it overstep its jurisdiction in any matter, its acts may be annulled by a decree of the President. Members are liable to penalties for non-attendance or neglect of duty. They are, however, on the other hand, paid nothing for their services.

451. At the first regular session of the year the Council considers general business; at the second and longer session it discusses the budget of the department, presented by the Prefect, and audits the accounts of the year At either session it may require from the Prefect or any other chief of the departmental service full oral or, if it choose, written replies to all questions it may have to ask with reference to the administration.

452. The supervisory and regulative powers of the General Council are of considerable importance; but its originating powers are of the most restricted kind. It has the right to appropriate certain moneys for the expenses of local government, but it has not the right to tax for any purpose. The amount and the source of the money it is to use are determined by the Chambers in Paris. Even such narrowed acts of appropriation as it can pass have to be confirmed by presidential decree. Its chief functions are directory, not originative. It sees to the renting and maintenance of the buildings needed for its own use, for the use of the Prefect and his subordinates, for the use of the public schools, and for the use of the local courts; it votes the pay of the police (*gendarmerie*) of the Department; provides for the cost of printing the election lists; supervises the administration of the roads, railroads, and public works of the Department; oversees the management of lunatic asylums and the relief of the poor. Most important of all, it apportions among the several arrondissements the direct taxes annually voted by the Chambers.

453. **The Departmental Commission.** — During the intervals between its sessions, the General Council is represented in local administration by a committee of its own members called the Departmental Commission, which it elects to counsel and oversee the Prefect. The powers of this Commission, however, are merely advisory.

454. **Central Control.** — The most noticeable feature of this system is the tutelage in which local bodies and the individual citizen himself are kept. Fines compel the members of the General Council to do their work, and then every step of that work

is liable to be revised by the central administration. Irregularities in the election of a member may be brought to the attention of the General Council by the Prefect, as well as by its own members or by petition from the constituency affected. If the Council overstep the limits of its powers, it is checked by decree, and not by such a challenging of its acts in the courts by the persons affected as, in English or American practice, strengthens liberty by making the individual alert to assert the law on his own behalf, instead of trusting inertly to the government to keep all things in order. Even expression of opinion on the part of the General Council is restricted. It may express its views on any matter affecting local or general interests, 'if only it never express a wish which has a political character.'

455. **The Arrondissement** is the electoral district for the Chamber of Deputies, the members of the Chamber of Deputies being elected, as we have seen, not 'at large,' for the whole Department, but by Arrondissements, — not by *scrutin de liste*, that is, but by *scrutin d'arrondissement* (sec. 404). It also serves as a judicial district and as the province of an arrondissemental Council. The Council of the Arrondissement (*conseil d'arrondissement*), elected from the cantons, like the General Council of the Department, has no more important function than that of subdividing among the communes the quota of taxes charged to the Arrondissement by the General Council. For the rest, it merely gives advice to administrative officers appointed by the ministers in Paris. Its decisions are largely controlled by the Prefect, and may be annulled by the President of the Republic.

456. **The Canton** is the electoral district from which members are chosen to the General Council and the Council of the Arrondissement; it marks the jurisdiction of the Justice of the Peace; it is a muster district for the army, and serves as a territorial unit of organization for registration and for the departmental care of roads; but it has no administrative organization of its own. It is a mere region of convenient size for electoral and like purposes.

457. **The Commune**, unlike the arrondissement and canton, is as vital an organism as the Department. All towns are communes; but there is, of course, a much larger number of rural than of town communes.

458. There are 36,170 Communes, most of which have less than 1500 inhabitants and many of which have less than 500. One hundred and seventeen have more than 20,000. Every city of France, except Paris and Lyons, is organized as a Commune.

459. The general rule of French administration is centralization, the direct representation of the central authority, through appointed officers, in every grade of local government, and the ultimate dependence of all bodies and officers upon the ministers in Paris. In one particular this rule is departed from in the Commune. The chief executive officer of the Commune, the mayor, is elected, not appointed. He is chosen by the Municipal Council from among its own members, and is given one or more assistants elected in the same way.

460. Down to 1874 the mayors of the more populous Communes were appointed by the authorities in Paris, the mayors of the smaller Communes by the Prefects. Between 1831 and 1852 the choice of the appointing power was confined to the members of the Municipal Councils; between 1852 and 1874 the choice might be made outside those bodies. From 1874 to 1882 the smaller Communes elected their mayors, indirectly as now. Since 1882 all mayors have been elected.

461. **The Communal Magistracy.** — The mayor and his assistants do not constitute an executive *board:* the mayor's assistants are not his colleagues. He is head of the communal government: they have their duties assigned to them by him. The mayor is responsible, not to the Council which elects him, but to the central administration and its departmental representative, the Prefect. Once elected, he becomes the direct representative of the Minister of the Interior. If he will not do the things which the laws demand of him in this capacity, the Prefect may delegate some one else to do them, or even do them himself instead. For cause, both the mayor and his assistants may be suspended, by the Prefect for one month, by the Minister of the Interior for three months, and all their acts are liable to be set aside either by Prefect or minister. They may even be removed by the Executive.

462. In case of a removal it is the duty of the Municipal Council to fill the vacancies, and to fill them with other men; for removal renders the mayor or his assistants ineligible for one year.

463. One of the duties of the mayor is to appoint the police force and other subordinate officers of the Commune; but in Communes of over forty thousand inhabitants the mayor's composition of the police force must be ratified by decree, and in other Communes all his appointments must be confirmed by the Prefect.

464. **The Municipal Council.** — There is in every Commune a Municipal Council (of from ten to thirty-six members, according to the size of the commune) which has, besides its privilege of electing the mayor and his assistants, pretty much the same place in the government of the Commune that the General Council has in the government of the Department; and, in the main, a like dependence upon the approval of the central administration. Unlike the General Council, the Municipal Council is liable to be suspended for one month by the Prefect; like the General Council, it may be dissolved by decree of the President passed in the Council of Ministers. It holds four regular sessions each year, one of which it devotes to the consideration of the municipal budget, which is presented by the mayor. Its financial session may continue six weeks; none of its other sessions may last more than fourteen days. The mayor acts as its president, except when his own accounts are under consideration.

465. Neither the Municipal Council nor the Council of the Arrondissement is judge of the validity of the elections of its members. Contested election cases are heard by the Prefectural Council (sec. 469).

466. Until 1831 the Municipal Council was chosen by the Prefect from a list of qualified persons made up in the Commune. Between 1831 and 1848 its members were elected by a restricted suffrage. Since 1848 they have been elected by universal suffrage.

467. In case of a dissolution of the Municipal Council, its place may be taken, for the oversight of current necessary matters, by a delegation of from three to seven members appointed by the President of the Republic to act till another election can be had. This delegation cannot, however, take upon itself more than the merely directory powers of the Council.

468. **Administrative Courts: the Council of State.** — So thorough is the differentiation of functions in France that actions at law arising out of the conduct of administration are instituted, not in the regular law courts connected with the Ministry of Justice, but in special administrative courts connected with the Ministry of the Interior. French thought, inherited from days of un-

bounded royal prerogative, makes sharp separation between Public Law, which concerns the action of the government, and Private Law, which concerns the relations of individuals to one another. The ordinary courts will determine the rights of an individual when they concern the action of another individual; but the special courts of the administration must determine the questions involved in any challenge of official action, — in any challenge of the public power. (Comp. sec. 437.) The highest of these courts is the Council of State, which is composed of the ministers, and of various high administrative officers of the permanent service. It is the court of last resort on administrative questions. It is also charged with the duty of giving advice to the Chambers or to the government on all questions affecting administration that may be referred to it.

469. **The Prefectural Council.** — Below the Council of State are the Prefectural Council, a Court of Revision, a Superior Council of Public Instruction, and a Court of Audit. These are not subordinate to each other: each is directly subordinate to the Council of State. The Prefectural Council is directly associated with the Prefect and is the most important of them. It has, amongst other weighty functions, that of determining the validity of elections to the Council of the Arrondissement and to the Municipal Council. For the rest, it has jurisdiction over all administrative questions, and over all conflicts between administrative authority and private rights. Its processes of trial and adjudication are briefer and less expensive than those of the ordinary law courts. In almost all cases an appeal lies to the Council of State.

470. The Prefect is the legal representative of the government in cases brought before the Prefectural Council; but that court is not at all under his dominance. It is composed of permanent judges, one of whom, at least, is usually of long administrative experience. Its members are appointed, and, for cause, are removable, by the central administration.

471. Each minister is himself a judge of first instance in cases whose consideration is not otherwise provided for, an appeal almost always lying, however, to the Council of State. Prefects and mayors are, in like manner, judges of first instance in certain small cases.

The Administration of Justice.

472. **Ordinary Courts of Justice.** — The supreme court of France is the Cassation Court (the Court, that is, of reversals or appeals) which sits at Paris. Next below it in rank are twenty-six Courts of Appeal, the jurisdiction of each of which extends over several Departments. These hear cases brought up from the courts of first instance which sit in the capital towns of the arrondissements. These last consider cases from the Justices of the Peace, who hold court for the adjudication of small cases in the cantons. By decree of the President, passed in the Council of Ministers, the Senate may be constituted a special court for the consideration of questions seeming to involve the safety of the state; and such questions may be removed by the same authority from the ordinary courts.

473. The appointment of all judges rests with the President, or, rather, with the Minister of Justice; and the tenure of the judicial office, except in the case of Justices of the Peace, is during good behavior. In the case of Justices of the Peace, the President has power to remove.

474. **Jury Courts.** — In France, the ordinary civil courts are without juries; the judges decide all questions of fact as well as all questions of law. There are, however, special jury courts (*cours d'assises*) constituted four times a year in each Department for the trial of crimes, and of political and press offences; and in these the jury is sole judge of the guilt or innocence of the accused; the judges determine the punishment.

475. **Tribunal of Conflicts.** — Between the two sets of courts, the administrative and the ordinary, there stands a Tribunal of Conflicts, whose province it is to determine to which jurisdiction, the administrative or the ordinary, any case belongs whose proper destination, or forum, is in dispute. This Tribunal consists of the Privy Seal as president, of three State Councillors chosen by their colleagues, and of three members of the Cassation Court selected, in like manner, by their fellow-judges, besides two members chosen by those already mentioned.

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VII.

THE GOVERNMENTS OF GERMANY.

476. **The Feudalization of Germany** was in some points strongly contrasted with the feudalization of France. There was in Germany no Romanized subject population such as existed in Gaul, with habits which should enter like a leaven into the polity of their conquerors. Beyond the Rhine all were of one general kin, all bred to the same general customs. What was new there was the great Frankish kingship of Merowingian and Carolingian, — the new size and potency of the regal power bred amidst the readjustments of conquering migration by the dominant Franks. For the rest, there was at first the old grouping about elective or hereditary princes, the old tribal individualities of custom, the old organization into separate, semi-independent, self-governing communities. Feudalism came, not so much through fresh gifts of land and novel growths of privilege based upon such fresh gifts, not so much through 'benefice' and 'commendation' (secs. 305–308, 310), as through the official organization of the Frankish monarchy.

477. **Official System of the Frankish Monarchy: the Grafen.** — In order to exercise their kingly powers the more effectually, the Frankish monarchs adopted the natural plan, for which there was Roman precedent, of delegating their functions to officers commissioned to act as their representatives in various districts of their extensive domains. There does not seem to have been any symmetrical division of the territory into districts to fit the official system. Here and there there were counts (*Grafen*), the king's vicegerents in the exercise of the financial, judicial, and military prerogatives of overlordship; but the limits of their jurisdiction were not always sharply defined. There were, for one thing,

many exemptions from their authority within the general districts allotted them. There were the dignity and pretensions of provincial princes to be respected; more important still, there were the claims of the great landowners to a special jurisdiction and independent lordship of their own to be regarded. As a matter of policy such claims were generally allowed. The demesnes of the greater landowners were cut out from the administrative territory of the *Graf* and given separate political functions. Barons, such as we have seen in France, — local autocrats with law courts and a petty sovereignty of their own, — were freely created. The king apparently could not deny them the 'immunities' they demanded.

478. **The Magistracy of Office and the Magistracy of Proprietorship.** — There thus grew up, side by side, a double magistracy — a magistracy of office and a magistracy of proprietorship. The *Graf* ruled by virtue of his office; the baron by virtue of his landed possessions: there were lords by privilege (*Immunitätsherren*), and lords by commission. As time went on the two sets of magnates drew nearer and nearer to the possession of a common character through an interchange of qualities. The office of *Graf* tended more and more to become hereditary and to connect itself with the ownership of large estates. Heredity of title and prerogative was the almost irresistible fashion of the age: the men of greatest individual consequence, besides, — the men who were fit because of their individual weight to be delegated to exercise the royal authority, — were commonly the men of large properties. Either there went, therefore, along with the grafship, gifts of land, or else men already sufficiently endowed with lands were given the grafship: and as the office connected itself with proprietorship it took from proprietorship its invariable quality of heredity. This was the double process: *Grafs* became hereditary territorial lords; and hereditary territorial lords acquired either the grafship itself or powers quite as great.

479. **Hereditary Chiefs.** — Add to this hierarchy the more ancient princes of the tribes, and the tale of greater lords is complete. These princes were, by traditional title at least, rulers of the once self-governing communities which Frankish ascendency had in the days of conquest united under a common author-

ity. In many cases, no doubt, they retained a vital local sway. They were intermediate, in the new political order, between the king and the barons.

480. **Full Development of Territorial Sovereignty.** — By the thirteenth century German feudalization was complete. Princes (dukes), *Grafs*, and barons had all alike become lords within their own territories (*Landesherren*). Bishops and abbots, too, as in France, had entered the competition for power and become themselves *Grafs* and barons. That territorial sovereignty, that private ownership of political authority which is the distinguishing mark of feudalism, and which we have seen so fully developed in France, is present in as full development here in Germany also. But the elements of the development are very different in the two countries. In France we have seen the appointment of royal delegates come after the perfecting of feudalism and lead, through the gradual concentration of judicial and other authority in the king's hands, to the undermining and final overthrow of baronial sovereignty (secs. 380, 385). In Germany, on the contrary, the royal representatives, appointed while feudalism was taking shape, themselves entered and strengthened the baronage, quitting their dependent functions as officials for the independent privileges of territorial lords.

481. **The Markgraf.** — One office especially fostered feudal independence in Germany. Outside the hierarchy I have described, and standing in special relations with the king, was the *Markgraf*, — the *Graf* of the *Mark* or border, set to defend the kingdom against inroads by hostile peoples. He was of course chosen chiefly because of his capacity in war, and was of the most imperative, masterful soldier breed of the times. To him, too, were necessarily vouchsafed from the first extraordinary powers. He was made virtual dictator in the unsettled, ill-ordered border district which he was appointed to hold against foreign attack; and he was freely given all the territory he could conquer and bring under the nominal authority of the king. It was thus that the Mark Brandenburg spread itself out to the northeast, to become at last a great kingdom, and that the *Ostmark*, established by Charles the Great as a barrier against the Hungarians, increased till it became the great state of Austria. The *Markgraf* was not

long in becoming virtually a ruler in his own right, little disturbed by the nominal suzerainty of a distant monarch, and possessed by fast hereditary right of the titles and powers which would one day make of him a veritable king.

482. **The Empire.** — Charles the Great set for his successors the example of a wide rule and a Roman title. But for many a long age it seemed as if he had left behind him nothing but a tradition and a scheme of power which no man was able to take up. His great empire fell to pieces, never to be put together again, except as it seemed to rise once more for a little space in the days of Charles V. Even the greater fragments of it fell apart beyond the Rhine, shattered by the disintegrating forces of feudalism. But the name and shadow of the imperial power persisted from age to age with a strange vitality. First a line of Saxon princes, then men of the Franconian house, after them the masterful Hohenstaufan essayed the office Charles had made great, wielding such authority as they could as power came and went amidst the shifting scene of German politics. Finally the succession fell to the house of Habsburg, who were building a veritable kingdom together upon the southern skirts of Germany, where the *Ostmark* had grown to be Austria. As their strength increased, their presidency amidst the German states became an unmistakable power of command, and Germany had at last a leader, if not a master.

483. **The Imperial Cities.** — While the imperial power languished a notable thing happened. Germany gave birth to great free cities, set like independent states in the midst of their weak neighbors. The cities of the Empire had, as feudalism developed, fallen into its order in two classes. Some of them held their privileges of the Emperor himself, were his immediate vassals; others were subordinated to some feudal lord and were subjects of the Empire only through him. The position of those immediately dependent upon the Emperor was much more advantageous than the position of those who had lesser and nearer masters. The imperial supervision was apt to be much less exacting than the overlordship of princes who, having less wide interests to care for than those which busied the Emperor, could render their power greater by concentration. They were always

near at hand and jealous of any movement of independence on the part of the towns within their domain; the Emperor, on the other hand, was often far away and never by possibility so watchful. He was represented always by some deputy; but the presence of this officer did not greatly curtail municipal self-government. In the thirteenth century even this degree of control was got rid of at the suit of some of the cities. They were allowed to become 'free' imperial cities, bound to the Emperor only by sworn allegiance, not by any bonds of actual government. The next step in the acknowledgment of their independence and importance was their admission to representation in the Diet of the Empire, — and such recognition was not long delayed. The rôle of these great free cities in imperial affairs became one of the most important of the many independent rôles played on the confused stage of that troubled time. Lübeck, Hamburg, and Bremen retain to this day a certain privilege of position as free cities in the German Empire (secs. 497, 500).

484. **The Swiss Confederation.** — Almost at the very time that the Habsburgs first won the imperial crown and acquired the duchy of Austria, some of their Swiss dependencies broke away from them, and established an independence never since permanently broken. Schwyz, Uri, and Unterwalden, the sturdy little mountain communities grouped about the southern end of quiet Lucerne, with whose struggle for freedom the glorious story of the Swiss Confederation begins, contained some part of the estates of the Counts of Habsburg, whose hereditary domains touched the other end of Lucerne, and stretched wide to the north about the further shore of Lake Geneva, and southward again on the West. The region of the Alps contained the notable imperial cities of Zürich, Berne, Basle, and Schaffhausen; and Schwyz, Uri, and Unterwalden claimed to be immediate vassals of the Emperor, as these cities were. The Counts of Habsburg, in despite of this claim, sought to reduce them to submission to themselves. The result was a long struggle in which the three little cantons, at first joined only by their neighbor canton, Lucerne, but afterwards by Zürich, Glarus, Zug, and Berne, were eventually completely victorious. By the formation of this famous league of free cantons and cities, at first known as the "Old League of High Germany," but ultimately as Switzerland (the land of Schwyz), there emerged from the German Empire one of the most interesting states known to history. It may be said to have been the offspring of the disintegrating forces of the Empire, — a living proof of its incoherence. In the next chapter we shall consider its political development with the special attention which it merits.

485. **Austria's Rival, Prussia.** — While Austria's power was on the make a formidable rival had grown up in the north, out of the North Mark established in the tenth century as the Empire's barrier against the Wends. Men of energy and daring had steadily pushed forward the eastern boundaries of the Mark until it had become a great territory, the Mark Brandenburg. In the fifteenth century the markgrafship fell into the hands of a race more capable than the Habsburgs, the Hohenzollern of Nürnberg. Under them it waxed greater yet alike in territory and in organized power: took in Prussia, the district from which it was to get its later name, and got ready for the great rôle it was to play in the seventeenth, eighteenth, and nineteenth centuries. In 1640 Frederic William, the Great Elector (1640–1688), came upon the stage, to make his power a determining element in the politics of Europe. His son was Frederic, the first 'king of Prussia.'

486. **Frederic the Great.** — Frederic, the first king of Prussia, governed from 1688 to 1713. His son, Frederic William I. (1713–1740), rounded out Brandenburg's possessions and hoarded the money and prepared the army with which his son, Frederic the Great (1740–1786), was to complete the greatness of Prussia. The great Frederic took Silesia from Austria, and then, joining in the heartless and scandalous partition of Poland in 1772, filled up the gap between Brandenburg and East Prussia with West Prussia and the Netze district, territory already thoroughly German. The second and third partitions of friendless Poland in 1793 and 1795 added to Prussia the districts now known as South and East Prussia.

Prussia was at last ready for her final rivalry with Austria for the leadership of Germany. But first there was to be the great storm of the Napoleonic wars, which was to sweep away so much that was old in German political arrangements, and create the proper atmospheric conditions for German nationality.

487. **Napoleon: the Confederacy of the Rhine.** — One of the earliest acts of Napoleon in his contest with Austria and Prussia was to isolate these two great German states by thrusting between them a barrier of smaller German states attached to the French interest. So little coherent was Germany, so little had the Empire made of the Germans a single nation, that Napoleon was

able to detach from all alliance with either Austria or Prussia every one of the German states except Brunswick and the electorate of Hesse. Of these the chief were the kingdoms of Bavaria and Württemberg and the grand-duchy of Baden. Napoleon organized out of these allies the so-called 'Confederacy of the Rhine,' of which he constituted himself 'Protector,' and which lasted from 1806 till 1813.

488. The year 1806 had marked also the formal end of the 'Holy Roman Empire' over which the Habsburgs had so long presided. The eighteenth century had witnessed a notable decline in their power; the sweeping conquests of Napoleon put them at his mercy; and in 1806 Francis of Austria was forced to abdicate and forever renounce the imperial office. There was no more to be a German Empire till Prussia should draw one about her, and Austria be once for all ousted from her place of leadership in Germany.

489. **The German Confederation** (1815–1866). — Despite the ease with which he at first divided Germany in order to conquer it, Napoleon discovered at last that he had himself aroused there a national feeling which was to cast him out and ruin him. In 1813 Germany rose, the Confederacy of the Rhine went to pieces, and all Napoleon's plans were undone. He had done Germany the inestimable service of making her patriotic. The Congress of Vienna, which met at the close of the Napoleonic wars to recompose Europe, could not revivify the German Empire: that had been dead for some time before Napoleon forced a winding up of its affairs. But Germany was not to remain disintegrate. The year 1815 witnessed the formation of a new union of the German states, the German Confederation, which, loose as it seemed, held them more closely together than they had been held for many generations. Austria was the president of the Confederation. The organ of government was a Diet of ambassadors from the thirty-nine component states (kingdoms, duchies, cities, principalities) authorized to mediate between the states in all matters of common concern; and the Confederation maintained an army of thirty thousand men. The arrangement was little enough like national union: the large states had a preponderant representation in the Diet, Austria dominating all; and each state, whether great

or small, was suffered to go its own way, make its own alliances, and fight its own wars, if only it refrained from injuring any one of the Confederates or the interests of the Confederation. But there was sufficient cohesion to keep the states together while German national feeling grew, and while the political revolutions of the century (1830 and 1848) liberalized political institutions.

490. **Period of Constitutional Reform.** — In 1848 most of the German states, except Prussia, granted to their people constitutional government. In the same year a 'German National Parliament' met at Frankfort (the seat of the Diet of the Confederation) and attempted to formulate a plan for more perfect union under the leadership of Prussia; but its leaders proposed much more than was possible, the time was not yet ripe, and the attempt failed. Still earlier, in 1833, Prussia had led in the formation of a 'Customs Union' (*Zollverein*) between herself and all[1] the states of the Confederation except Austria, which laid a free-trade basis for those subsequent political arrangements from which also Austria was to be excluded. In 1850 Prussia received from the hands of her king the forms, at least, of a liberal government, with parliamentary institutions; and these concessions, though at first largely make-believe, served eventually as the basis for more substantial popular liberties.

491. **The North German Confederation** (1867–1871). — Finally, in 1866, came the open breach between Prussia and Austria. The result was a six weeks' war in which Austria was completely defeated and humiliated. The Confederation of 1815 fell to pieces; Prussia drew about her the Protestant states of Northern Germany in a 'North German Confederation'; the middle states, Bavaria, Württemberg, Baden, etc., held off for a while to themselves; and Austria found herself finally excluded from German political arrangements.

492. **Austria out of Germany.** — Since then Austria, originally predominantly German, has devoted herself to the task of amalgamating the various nationalities of Southeast Europe under her hegemony, and so has become in large part a non-German state. Prussia has become the head and front of Germany, in her stead.

[1] The Union did not at first include this 'all,' but it did eventually.

Meantime Prussia has grown more than one-fifth in territory. The rearrangement at Vienna in 1815 gave her Swedish Pomerania and the northern half of Saxony; the war of 1866 confirmed her in the possession of Schleswig-Holstein, Hannover, Hesse-Cassel, Hesse-Nassau, and Frankfort.

493. **The German Empire.** — The finishing impulse was given to the new processes of union by the Franco-Prussian war of 1870–1871. Prussia's brilliant successes in that contest, won, as it seemed, in the interest of German patriotism against French insolence, broke the coldness of the middle states towards their great northern neighbor; they joined the rest of Germany; and the German Empire was formed (Palace of Versailles, January 18, 1871).

Government of the Empire.

494. **Austria and Germany: Character of the German Empire.** — When he ceased to be Emperor of the Holy Roman Empire (1806; sec. 488), Francis I. still remained Emperor of Austria. He had assumed that title in 1804; and from that day to this there has been in full form, — what there had long been in reality, — an Austrian Empire. In 1871 there arose by its side a new German Empire, but the two empires are thoroughly unlike one another. The Austrian Empire, though wearing the form of a dual monarchy as Austria-Hungary, is composed of the hereditary possessions of the House of Habsburg; the German Empire, on the other hand, is a federal state composed of four kingdoms, six grand-duchies, five duchies, seven principalities, three free cities, and the imperial domain of Alsace-Lorraine, these lands being united in a great 'corporation of public law' under the hereditary presidency of the king of Prussia. Its Emperor is its president, not its monarch.

495. The four kingdoms are Prussia, Bavaria, Saxony, and Württemberg; the grand-duchies, Baden, Hesse, Mecklenburg-Schwerin, Saxe-Weimar, Oldenburg, and Mecklenburg-Strelitz; the duchies, Brunswick, Saxe-Meiningen, Anhalt, Saxe-Coburg, and Saxe-Altenburg; the principalities, Waldeck, Lippe, Schwarzburg-Rudolstadt, Schwarzburg-Sondershausen, Reuss-Schleiz, Schaumburg-Lippe, and Reuss-Greiz; the free cities, Hamburg, Lübeck, and Bremen.

496. **The Central German States and the Empire.** — The first step towards the present union was taken in 1870, when Baden, Bavaria, and Württemberg, fearing that the object of Napoleon III. was to conquer the central German states or renew the Confederation of the Rhine, decisively espoused the side of Prussia and the North German Confederation. While the siege of Paris was in progress these three states sent delegates to King William at Versailles and formally united themselves with their northern compatriots: the North German Confederation became the German Confederation, with King William as president. Almost immediately, thereafter, the influences of the time carried the Confederates a step farther: at the suggestion of the king of Bavaria, the president-king was crowned Emperor, and the German Confederation became the German Empire.[1]

497. **The Character of the Empire.** — These changes of membership and of title did not, however, change the character or, at first, the constitution of the union. It remained a federal state, and the king of Prussia was still its president only; he was not its monarch. Its make-up and powers were not radically altered. Prussia, indeed, was very great: in territory more than three times as large as all the other states of the union put together, her population three-fifths that of all Germany; and the king of Prussia had other means of mastery than those afforded by the law. But as Emperor he occupies not an hereditary throne, but only an hereditary office. Sovereignty does not reside in him, but "in the union of German federal princes and the free cities." He is the chief officer of a great political corporation, whose object it is to "form an eternal union for the protection of the realm and the care of the welfare of the German people."

498. **The Emperor.** — Still his constitutional prerogatives are of the most eminent kind. Unlike other presidents, he is irresponsible: he cannot be removed, his office belonging inalienably to the throne of Prussia, whether its occupant be king or regent only. He summons, opens, adjourns, and closes the two Houses of the federal legislature, the *Bundesrath* and the *Reichstag*, the latter of which he can also, with the consent of the *Bundesrath*, dissolve. He appoints, and may at his pleasure remove, the Im-

[1] The present constitution of the Empire bears date April 16, 1871.

perial Chancellor, who is both the vital centre of all imperial administration and the chairman of the *Bundesrath;* and he appoints also, under the countersignature of the Chancellor, all minor officers of the imperial service, whom, with a like coöperation of the Chancellor, he may also dismiss. He controls the foreign affairs of the Empire and commands its vast military forces; and in this latter capacity, of commander-in-chief of the imperial army, it rests with him, acting at the suggestion of the *Bundesrath,* to coerce into obedience such states of the Empire as may at any time wilfully and pertinaciously neglect to fulfil their federal duties. He has, in brief, to the fullest extent, both the executive and the representative functions now characteristic of the head of a powerful constitutional state. There are distinct limits to his power as Emperor, limits which mark and emphasize the federal character of the Empire and make of it a state governed by law, not by prerogative; but those limits nevertheless lie abundantly wide apart. Adding, as he does, to his powers as hereditary president of the Empire his commanding privileges as king of Prussia and, as king of Prussia, the dominant member of the Union, he possesses no slight claim to be regarded as the most powerful ruler of our time. (Compare secs. 415, 418, 423, 746, 761, 775, 796, 813, 823, 860, 889, 1329, 1381, 1382.)

499. **Sovereignty of the Empire in Legislation.** — So complete, so unlike that of a mere confederation, is the present union of German states that the sovereign legislative power of the Empire is almost unlimited. The constitution can be amended by the federal legislature; amendment may change all the existing allotments of power as between the federal and the state governments; powers now reserved to the states can, except in one or two instances in which they are explicitly guaranteed, be withdrawn from them without their consent. The individual states virtually retain their general rights "only by sufferance of the Empire."[1] Amendments of the constitution are not submitted either to the people or to the governments of the states: nor are they passed by any special or peculiar procedure, as in France (sec. 411). They are originated and acted upon as ordinary

[1] Laband, *Das Staatsrecht des deutschen Reiches* (Marquardsen's *Handbuch*), p. 22.

laws would be. The only limitations put upon their passage are, first, that fourteen negative votes in the *Bundesrath* will defeat a proposed amendment, and, second, that no state can be deprived of any right guaranteed to it by the constitution, without its own consent. From the first the legislative power of the Empire has covered the entire field of the law of contracts, of commercial law, and of criminal law; and by an amendment of December 20, 1873, it was extended to the whole field of civil law as well. For some time it did not exercise its power over the whole domain of these great subjects, but it has now enacted, besides full codes of commercial and criminal law, an exhaustive civil code which has brought practically all of private law under the statutes of the imperial government.

500. **The Bundesrath: its Composition and Character.** — The central and characteristic organ of the Empire is the *Bundesrath*, the Federal Council, which is, alike in make-up and function, the lineal successor of the Diet of the older Confederation. In form, in theory, and indeed in fact, the *Bundesrath* is a body of ambassadors. Its members represent the governments of the states from which they come, and are accredited to the Emperor as diplomatic agents, plenipotentiary *charges d'affaires*, to whom he must extend the same protection that is extended to the like representatives of foreign states. It is a fundamental conception of the German constitution that "the body of German sovereigns together with the senates of the three free cities, considered as a unit, — *tanquam unum corpus*, — is the repository of imperial sovereignty";[1] and the *Bundesrath* is the organ of this body. It is therefore the organ through which the sovereignty of the Empire is expressed. The Emperor does not exercise sovereignty: he only shares it as king of Prussia, so far as the Empire is concerned, and takes part in its exercise only through the Prussian members of the *Bundesrath*. It follows, of course, from this principle that the members of the *Bundesrath* are only the agents of their governments, and act under instructions from them, making regular reports of the proceedings of the *Bundesrath* to their home administrations. The votes of a state are valid, whether cast by her representatives in accordance with their instructions or not;

[1] Laband, p. 40.

but the delegates are responsible for every breach of instructions to their home authorities. In practice they are generally themselves members of the governments they represent, entrusted also with high administrative functions at home, and representing their governments in the local legislative bodies of their own states, as well as in the *Bundesrath*. The *Bundesrath* is thus used, as it was intended to be, and as it was used under the somewhat looser forms of the earlier Confederation, as a body of consultation and guidance, a larger sort of imperial cabinet, in which the responsible ministers of the several states draw together to determine all questions of general interest, whether they affect the making or the administration of the laws.

501. **Representation of the States in the Bundesrath.** — The states of the Empire are unequally represented, according to their size. Prussia has seventeen votes; Bavaria six; Saxony and Württemberg four each; Baden and Hesse each three; Mecklenburg-Schwerin and Brunswick each two; the other seventeen states one apiece. The votes of each state which is entitled to more than one vote must be cast together as a unit, and each such state can cast her full vote whether or not she have her full number of representatives present.

502. Members are sent and withdrawn at the pleasure of their respective governments, like the responsible agents they are; and their constant responsibility makes formal instruction as to their votes upon particular measures for the most part unnecessary. The smaller states have found the duty of maintaining representatives at times very onerous; and, inasmuch as it is not required by law that their delegates should be chosen from among their own citizens, it has become a common practice for them to serve economy and their own convenience by combining to maintain joint representatives. Groups of them combine, and each group delegates their powers to a single person, who is authorized to represent them severally. Since 1880, however, the session of the *Bundesrath* has been divided into two periods, in one of which the more important matters of the year are considered; and during this part of the session each state is required to vote, if it votes at all, through its own separate delegate. During the remainder of the session routine matters are disposed of and joint representation is permitted.

503. The significance of the constitutional provision that amendments to the constitution may not pass if there be fourteen negative votes cast in the *Bundesrath* is quite evident. A combination of the small states

may defeat any organic change of law proposed by the large states; and Prussia alone can bar any amendment to which she is opposed. The seventeen votes of Prussia on the one side and the seventeen votes of the small states on the other might be said, were there any real offset to the power of Prussia, to constitute the central balance of the system.

504. **Functions of the Bundesrath.** — The *Bundesrath* occupies a position in the German system in some respects not unlike that which the Roman Senate held in the government of Rome (secs. 171–174). It is, so to say, the residuary legatee of the constitution. All functions not specifically entrusted to any other constitutional authority remain with it, and no power is in principle foreign to its jurisdiction. It has a composite character, and is the presiding organ of the Empire. It is at one and the same time an administrative, a legislative, and a judicial body.

505. In its *legislative* capacity, it presides over the whole course of lawmaking. The *Reichstag* has the right to originate measures, but, as a matter of practice, originates very few. Most bills first pass the *Bundesrath* and go with its sanction to the *Reichstag*. If passed by the people's house, they are returned to the *Bundesrath* and there once more adopted. All the more important legislation, moreover, is framed by the imperial officials and presented to the *Bundesrath* by the Chancellor, who is not only president of the federal chamber but also chief of the Prussian delegation. Prussia, therefore, in reality presides over the process of legislation. Hers is the chief initiative; and the federal chamber, in which she commands seventeen votes, is the usual source of every great measure. The *Reichstag* has, of course, the right of amendment, and has sometimes exercised it with boldness; but nothing that it suggests can become law without the assent of the guiding and overseeing *Bundesrath*. The consent of the *Bundesrath*, as well as of the *Reichstag*, must be had also to every treaty which affects any matter that falls within the legislative powers of the Empire.

506. The measures sent down from the *Bundesrath* to the *Reichstag* are generally advocated there, if not by the chancellor himself, by members of the federal chamber specially delegated for that purpose; and the *Reichstag* is usually kept advised of the amendments which the *Bundesrath* will accept. All members of the *Bundesrath* have, however, the right to

be present in the *Reichstag*, and to express their views upon its floor concerning pending legislation, even when their views are not those which have been accepted by the majority in the *Bundesrath*.

507. The *administrative* function of the federal chamber may be summed up in the word *oversight*. It considers all defects or needs which discover themselves in the administrative arrangements of the Empire in the course of the execution of the laws, and may in all cases where that duty has not been otherwise bestowed, formulate the necessary regulation to cure such defects and meet such needs. It has, moreover, a voice in the choice of some of the most important officers of the imperial service. It nominates or elects the members of the Court of Accounts, of the Supreme Court of the Empire (*Reichsgericht*), and of the 'Chamber of Discipline,' as well as the officials who administer the imperial pension funds, and those who constitute the directory of the Imperial Bank. It confirms the nomination, also, either directly or through one of its committees, of consuls and of the officers who exercise the imperial control over the duties and taxes laid by the states under laws of the Empire. It may also be reckoned among the executive functions of the *Bundesrath* that its consent is necessary to a declaration of war (except in case of invasion, when the Emperor may act alone), to a dissolution of the *Reichstag* during a legislative period, and to coercive action against a state of the Empire.

508. The *judicial* functions of the *Bundesrath* spring in part out of its character as the chief administrative council of the Empire. When acting as such a council, many of its conclusions partake of the nature of decisions of a supreme administrative court of appeal. But its jurisdiction as a court is much wider than questions of administration. It can declare a state of the Empire delinquent, and order execution to issue against it. It is the court of highest instance in every case of the denial of justice to an individual in a state court arising out of a defect or deficiency in the law of the state; it being within its competence in such a case to compel the state to cure the deficiency and afford the suitor the proper remedy. It is the court of appeal in all cases of dispute between the imperial government and a state, and in all cases arising between two or more states of the Empire which

involve not mere private law questions (such cases go to the ordinary civil courts), but points of public law.

509. In case it cannot agree upon a conclusion in such disputes, the whole legislative power is brought into play and a law is passed covering the matter in controversy. If in any case it considers itself unfitted by its organization, or for any other reason, to act as a court in controversies brought before it, it may delegate its judicial powers to a court or to experts. This it did in 1877 with reference to the dispute between Prussia and Saxony concerning the Berlin-Dresden railway.[1]

510. **Organization of the Bundesrath.** — The Imperial Chancellor is chairman of the *Bundesrath*. He is appointed by the king of Prussia, and he must also be one of Prussia's seventeen representatives, — for it is the better opinion among German constitutional lawyers that the Chancellor's membership in the federal chamber is necessary to his presidency of the body. In case of a tie vote, the Chancellor's vote is decisive: that is to say, *the side on which Prussia's votes are cast prevails,* for her vote must be undivided: — the Chancellor's vote is not his own, but is one-seventeenth part of Prussia's whole vote.

511. The Chancellor may appoint a substitute to act in his absence as president, this limitation resting upon his choice, that if he does not appoint a Prussian delegate to the office he must appoint a Bavarian. He may also appoint a substitute to perform all his functions, and such an appointment would include the presidency of the *Bundesrath* unless a separate and special delegation of that office were made, — and unless, also, perhaps, the general substitute were not a member of the Federal Council.

512. Inasmuch as it is not merely the legislative but also the administrative organ of the Empire, the *Bundesrath* may be convened without the *Reichstag*. It must be called together if one-third of its members demand a session. Its business, moreover, is continuous from session to session, being taken up at each session where it was left off at the last: an arrangement by which it gains both efficiency and expedition in action. Its sessions are secret: for it preserves the reserve of a guiding cabinet. Its compromises and quarrels do not go abroad.

513. Imperial law makes no provision with regard to a *quorum* in the *Bundesrath*. It is believed by German jurists, however, that its business could go forward, after proper notice, if only the Chancellor, its president, were present. No state can cast its vote upon any question in which it is not interested.

[1] Laband, p. 43, *n.*

514. **Committees.** — The *Bundesrath* follows the practice of other deliberative bodies in referring various matters to special committees of its members. It has, too, like other bodies, certain standing committees. These are three: one on Alsace-Lorraine, one on the Constitution, and one on the Order of Business.

Much more important than these, however, are eight delegations of its members which, though called committees, may be more properly described as *Commissions*, for, like the executive committee of our own Congress under the old Confederation (sec. 1069), they continue to sit during the recesses of the chamber which they in a sense represent. Of these Commissions two are appointed by the Emperor, namely a Commission "for the Land Forces and Fortifications" and a Commission "for Naval Affairs": five are chosen yearly by the *Bundesrath*, namely, those "on Tariffs and Taxation," "for Trade and Commerce," "for Railways, Posts, and Telegraphs," "on Justice," and "on Accounts" (*Rechnungswesen*); the eighth and most important, the "Commission on Foreign Affairs," consists of the representatives of Bavaria, Saxony, and Württemberg, and of two other members chosen by the *Bundesrath*. At least five states must be represented on each of these Commissions, and Prussia must always be one of the five, except in the case of the Commission on Foreign Affairs. On this last Prussia needs no representation; she has committed to her, through her king who is also Emperor, the whole conduct of the foreign affairs of the Empire; the Commission is appointed simply to watch the course of international relations, and to inform the several states of the posture of foreign affairs from time to time. "It has to prepare no conclusion for the *Bundesrath* and to make no reports to it: it serves to receive communications concerning the foreign affairs of the Empire and to exchange opinions with the imperial administration concerning" those affairs.[1] Its action is thus independent of its connection with the *Bundesrath;* and this is the chief point of contrast between it and the other Commissions. Their duties are principally to the *Bundesrath:* they for the most part only make reports to it.

[1] Laband, p. 46.

515. Besides their right to representation on the Commission on Foreign Affairs, of which Bavaria has the presidency, Württemberg, Bavaria, and Saxony have also the right to appointments on the Commissions for Land Forces and Fortifications and for Naval Affairs which it is the privilege of the Emperor to name. Prussia is entitled to the presidency of all the Commissions except that on Foreign Affairs. Each state represented has one vote in the action of a Commission, and a simple majority controls.

516. **The Reichstag: its Character and Competence.** — It would lead to very serious misconceptions to regard the *Bundesrath* and the *Reichstag* as simply the two houses of the imperial legislature, unlike each other only in some such way as our Senate and House of Representatives are unlike, only, *i.e.*, because the upper house is differently constituted and is entrusted with a certain share in functions not legislative. Properly conceived, the *Bundesrath* and *Reichstag* stand upon a very different footing with reference to each other. The *Bundesrath* is the sovereign organ of the Empire, the authoritative representative of the "body of German sovereigns and the senates of the free cities." Though it originates most of the legislation of the Empire, legislation is no more peculiarly its business than is the superintendence of administration or the exercise of judicial functions. It, as part of the administration, governs; the *Reichstag*, as representing the German people, controls. The control of the *Reichstag* is exercised, not only through its participation in legislation, but also through the giving or withholding of its sanction to certain ordinances to whose validity the constitution makes its concurrence necessary; through its power of refusing to pass the necessary laws for the execution of treaties of which it does not approve; through its right to inquire into the conduct of affairs; and through its right of remonstrance. Its powers are not enumerated; they are, exercised in one form or another, as wide as the activities of the Empire. The legislative competence of the Empire is, since 1873, legally unlimited as to private law: it covers the whole field of civil and criminal enactment.

517. **Composition of the Reichstag.** — The *Reichstag* represents, not the states, or the people of the several states regarded separately, but the whole German people. Representation is dis-

tributed on the basis of about one representative to every one hundred and thirty-one thousand inhabitants. Representatives are, however, elected by districts, one for each district, and no district may cross a state line and include territory lying in more than one state. If, therefore, any state of the Empire have less than one hundred and thirty-one thousand inhabitants, it may, nevertheless, constitute a district and send a representative to the *Reichstag*.

518. The *Reichstag* at present (1897) consists of three hundred and ninety-seven members; and of this number Prussia returns two hundred and thirty-five, about three-fifths of the whole number. The electoral districts as they now stand (1897) are sadly in need of change. They were fixed so long ago that Berlin, though it has grown to possess more than a million and a half inhabitants, has only six members in the *Reichstag*.

519. The members of the *Reichstag* are elected for a term of five years by universal suffrage and secret ballot. The voting age in Germany is twenty-five years; and that is also the earliest age of eligibility to the *Reichstag*.

520. The election districts are determined in the northern states according to laws passed under the North German Confederation; in Bavaria, by the Bavarian legislature; in the other southern states, by the *Bundesrath*. The subdivisions of the districts, the voting precincts, are determined by the administrations of the states.

521. An absolute majority is required for election, as in France (sec. 405). In case no candidate receives such a majority, the commissioner of election — an officer appointed by the administration for each district — is to order a new election to take place within fourteen days after the official publication of the result of the first, the voting to be for the two candidates who received the highest number of votes. Should this second election result in a tie the lot decides.

522. Election to the *Reichstag* takes place, not on days set by statute, but on days appointed by executive decree, as in France (sec. 405). For the *Reichstag* may be dissolved by the Emperor, with the consent of the *Bundesrath* (by a vote in which Prussia concurs) before the completion of its regular term of five years.

523. In case of a dissolution, a new election must be ordered within sixty days, and the *Reichstag* must reassemble within ninety days. The Emperor may also adjourn the *Reichstag* without its own consent (or, in English phrase, prorogue it) once during any session, for not more than thirty days.

524. **Sessions of the Reichstag.** — The *Reichstag* meets at the call of the Emperor, who must call it together at least once each year; and who may convene it oftener. He must summon at the same time the *Bundesrath.* The sessions of the *Reichstag* must be public; it is not within its choice to make them private. A private session is regarded as, legally, only a private conference of the members of the *Reichstag,* and can have no public authority whatever.

525. Members of the *Reichstag* who accept a salaried office under the Empire or one of the states, or an imperial or state office of higher rank or power than any they may have held when elected, must resign and offer themselves for reëlection. (Compare sec. 865.)

526. **Organization of the Reichstag.** — The *Reichstag* elects its own President, Vice-presidents (2), and Secretaries. For the facilitation of its business, it divides itself by lot, for the session, into seven 'Sections' (*Abtheilungen*), each Section being made to contain, as nearly as may be, the same number of members as each of the others. These Sections divide among them the work of verifying the election of members and the choice of special committees. The *Reichstag* has no standing committees; but from time to time, as convenience suggests, temporary committees are named, whose duty it is to prepare information for the body, which they present in reports of a general nature. These committees it is which the Sections select. Each Section contributes its quota of members to each committee. The party leaders, however, always determine beforehand the division of places on the Committees and the Sections merely do their will in the matter. Government bills, moreover, are not referred to the committees. They play no such part in revision as is played by the committees of the French Chamber of Deputies (secs. 432–434). One-half of the members constitute a *quorum;* and an absolute majority is requisite to a valid vote.

527. **Election of Officers.** — The initial constitution of a newly elected *Reichstag* is interesting. It comes to order under the presidency of the oldest member; it then elects its president, two vice-presidents, and secretaries; the president and vice-presidents for a term of only four weeks. At the end of these four weeks a president and vice-presidents are elected for the rest of the session. There is no election of officers for

the whole legislative term, as in England and the United States: at the opening of each annual session a new election takes place. It is only at the first, however, that there is a, so to say, experimental election for a trial term of four weeks.

528. **Powers of the Reichstag: the Budget.** — The *Bundesrath*, as I have said, governs; the *Reichstag* in a measure controls. But only in a measure. Its assent is necessary to the validity of all legislation. Though the *Bundesrath* originates, it cannot rule in the field of law without the coöperation of the popular chamber. Like other popular assemblies, too, the *Reichstag* votes the taxes and subjects the government to sharp criticism when it asks for money. But the annual budget comes to it, like other subjects of legislation, from the *Bundesrath*, and with the sanction of that great chamber already behind it; many of the principal revenue laws are not annual but permanent; the army, for whose maintenance the larger votes are asked, is organized for periods of several years together and must be paid; and there is really very little latitude of choice with regard to any but new or subordinate expenditures. No minister is responsible to the *Reichstag* for what he does or proposes. The Emperor may dissolve the *Reichstag* at any time, if the *Bundesrath* consents, and has frequently exercised the power with the result of obtaining in the new elections the majority he desired. The *Reichstag* may influence affairs, may win slow victories by persistent and well-directed criticism, may force modifications of policy; but it is constantly made to realize the fact that it cannot govern, and that its chief function is not origination but control.

529. **Classes and Parties.** — The majority of its members, moreover, are Prussians, and Prussia is above all things else a military state, trained to the compact order and instinctive obedience of a strong monarchy. Classes, too, are sharply marked in Prussia. An active and influential landed aristocracy furnishes the army with its best officers, the court with its most devoted servants, the public assemblies with their most conservative leaders. The parties that desire democratic privilege work against ancient prestige, against the habit of the community, against the organization and the prejudices of long-established classes. National parties, moreover, are broken athwart by the divergent feelings

and variant interests of the different states of the unequal Empire. Prussia supports the monarchy whose power galls the lesser states; her statesmen withstand the process of liberalization which men of the smaller states would fain see pressed forward. Neither responsible party government nor any kind of clear-cut constitutional rule is yet possible.

530. **Imperial Administration.** — While the distinction between the executive and legislative functions of government is sharply enough preserved in Germany, no equally clear discrimination is made in practice between executive and judicial functions. The judiciary is a branch of the administration. The caption 'Imperial Administration' covers, therefore, all activities of the government of the Empire which are not legislative.

531. Although it is a fundamental principle of the imperial constitution that 'the Empire has sovereign legislative power, the states only autonomy,' the Empire has heretofore occupied only a part of the great field thus opened to it, and has confined itself as a rule to mere oversight, leaving to the states even the execution of imperial laws.

532. The judges of all but the supreme imperial court, for instance, the tariff officials and gaugers, the coast officers, and the district military authorities, are state officers.

533. **The Imperial Chancellor.** — The Empire has, nevertheless, its own distinct administrative organs, through which it takes, whether through oversight simply or as a direct executive, a most important and quite controlling part in affairs; and the head and centre of its administration is the Imperial Chancellor, an officer who has no counterpart in any other constitutional government.

534. (1) Looked at from one point of view, the Chancellor may be said to be the Emperor's responsible self. If one could clearly grasp the idea of a responsible constitutional monarch standing beside an irresponsible constitutional monarch from whom his authority was derived, he would have conceived the real, though not the theoretical, character of the Imperial Chancellor of Germany. He is the Emperor's responsible proxy. Appointed by the Emperor and removable at his pleasure, he is

still, while he retains his office, virtually supreme head of the state, standing between the Emperor and the *Reichstag*, as the butt of all criticism and the object of all punishment. He is not a responsible minister in the English or French sense (secs. 427, 868, 869); there is, strictly speaking, no 'parliamentary responsibility' in Germany. In many respects, it is true, the Chancellor does occupy with regard to the *Reichstag* much the same position that a French or English ministry holds towards the representatives of the people; he must give an account of the administration to them, when a debate is forced upon him. But an adverse vote does not unseat him. His 'responsibility' does not consist in a liability to be forced to resign, but consists simply in amenability to the laws. He does not represent the majority in the *Reichstag*, but he must obey the law.

535. This 'responsibility' of the Chancellor's, so far as it goes, shields, not the Emperor only, but also all other ministers. "The constitution of the Empire knows only a single administrative chief, the Imperial Chancellor."[1]

536. So all-inclusive is the representative character of the chancellorship that all powers not specifically delegated to others rest with the Chancellor. Thus, except when a special envoy is appointed for the purpose, he conducts all negotiations with foreign powers. He is also charged with facilitating the necessary intercourse between the *Bundesrath* and the *Reichstag*.

The Chancellor's relation to the *Reichstag* is typified in his duty of submitting to it the annual budget of the Empire.

537. (2) Still further examined, the chancellorship is found to be the centre, not only, but also the source of all departments of the administration. Theoretically at least the chancellorship *is* the Administration: the various departments now existing are offshoots from it, differentiations within its all-embracing sphere. In the official classification adopted in German commentaries on the public law of the Empire, the Chancellor constitutes a class by himself.[2] There are (1) The Imperial Chancellor, (2) Administrative officials, (3) Independent (*i.e.*, separate) financial officials, and (4) Judicial officials. The Chancellor dominates the entire imperial service.

[1] Laband, p. 57.

[2] Laband, p. 56.

538. (3) A third aspect of the Chancellor's abounding authority is his superintendency of the administration of the laws of the Empire by the states. With regard to the large number of imperial laws which are given into the hands of the several states to be administered, the Empire may not only command what is to be done, but may also prescribe the way in which it shall be done: and it is the duty of the Chancellor to superintend the states in their performance of such behests. In doing this he does not, however, deal directly with the administrative officials of the states, but with the state governments to whom those officials are responsible. In case of conflict between the Chancellor and the government of a state, the *Bundesrath* decides.

539. The expenses of this administration of federal laws by the states fall upon the treasuries of the states themselves, not upon the treasury of the Empire. Such outlays on the part of the states constitute a part of their contribution to the support of the imperial government. The states are required to make regular reports to the imperial government concerning their conduct of imperial administration.

540. (4) When acting in the capacity of chairman of the *Bundesrath*, the Chancellor is simply a Prussian, not an imperial, official. He represents there, not the Emperor, for the Emperor as Emperor has no place in the *Bundesrath*, but the king of Prussia.

541. During most of the time since the institution of the Empire the Chancellor has been also chief minister of Prussia as president of the Council; and such a union of offices is both natural and desirable. Theories aside, the Prussian government guides imperial affairs through the Chancellor.

542. **The Vice-chancellorship.** — The laws of the Empire make a double provision for the appointment of substitutes for the Chancellor. As I have already said, in connection with his presidency of the *Bundesrath* (sec. 511), he may himself appoint a substitute, for whose acts he is, however, responsible. In addition to this a law of March 17, 1878, empowers the Emperor to appoint a *responsible* Vice-Chancellor. This appointment is made, upon the motion of the Chancellor himself, for the administration of all or any part of his duties, when he is himself hindered, even by an overweight of business, from acting; the Chancellor himself judging of the necessity for the appointment. The Chancellor may at any time, too, resume any duties that may have been entrusted to the Vice-

Chancellor, and himself act as usual. He is thus, in effect, ultimately responsible in every case, — even for the non-exercise of his office. The vice-chancellorship is only a convenience.

543. **Foreign Affairs.** — The full jurisdiction over the foreign affairs of the Empire conferred upon the imperial government by the constitution of the Empire does not exclude the several states from having their own independent dealings with foreign courts: it only confines them in such dealings to matters which concern them without immediately affecting imperial interests. The subject of extradition, for instance, of the furtherance of science and art, of the personal relations and private affairs of dynasties, and all matters which affect the interests of private citizens individually, are left to be arranged, if the states will, independently of the imperial Foreign Office. The states, therefore, have as full a right to send ambassadors for their own constitutional purposes as the Empire has to send ambassadors for its greater objects affecting the peace and good government of Europe. It may thus often happen that the Empire and several of the states of the Empire are at the same time separately represented at one and the same court. In the absence of special representatives from the states, their separate interests are usually cared for by the representative of the Empire. The department of the imperial administration which has charge of the international relations of the Empire is known as the Foreign Office simply (*das Auswärtige Amt*).

544. **Internal Affairs.** — The general rule of government in Germany, as I have said, is that administration is left for the most part to the states, only a general superintendence being exercised by the imperial authorities. But the legislative sphere of the Empire is very much wider than is the legislative sphere of the central government in any other federal state. Imperial statutes prescribe in very great variety the laws which the states administer, and are constantly extending farther and farther their lines of prescription. From the Empire emanate not only laws which it is of the utmost moment to have uniform, — such as laws of marriage and divorce, — but also laws of settlement, poor laws, laws with reference to insurance, and even veterinary regulations. Its superintendence of the local state administration of

imperial laws, moreover, is of a very active and systematic sort.

545. **Weights and Measures.** — Imperial methods of supervision are well illustrated in the matter of weights and measures. The laws with reference to the standard weights and measures to be used in commerce are passed by the imperial legislature and administered by state officials acting under the direction and in the pay of the state authorities; but thorough control of these state officials is exercised from Berlin. There is at the capital a thoroughly organized Weights and Measures Bureau (*Normal-Eichungskommission*), which supplies standard weights and measures, superintends all the technical business connected with the department, and is in constant and direct association with the state officials concerned, to whom it issues from time to time specific instructions.

546. **Money.** — With regard to money the control of the Empire is, as might be expected, more direct. The states are forbidden to issue paper money, and imperial legislation alone determines money-issue and coinage. But even here the states are the agents of the Empire in administration. Coining is entrusted to state mints, the metal to be coined being distributed equally among them. This, however, is not really state coinage. The state mints are the mere agents of the imperial government: they coin only so much as they are commanded to coin; they operate under the immediate supervision of imperial commissioners; and the costs of their work are paid out of the imperial treasury. They are state mints only in this, that their officers and employees are upon the rolls, not of the imperial, but of the state civil service. The Empire would doubtless have had mints of its own had these not already existed ready to its hand.

547. **Railways.** — The policy of the Empire with reference to the management of the railways is as yet but partially developed. The Empire has so far made comparatively little use of the extensive powers granted it in this field by its constitution. It could virtually control; but it in practice only oversees and advises. The Imperial Railway Office (*Reichs-Eisenbahnamt*) has advisory rather than authoritative functions; its principal supervisory purpose is to keep the various roads safe and adequately equipped. Some railways the Empire itself owns, but most of the lines are owned by the several states; and the states are bound by the constitution to administer them, not independently or antagonis-

tically, but as parts of a general German system. Here again the Empire has refrained from passing any laws compelling obedience to the constitution on this point; possibly because the states have assiduously complied of their own accord. Using the *Bundesrath* for informal conference on the matter (though the *Bundesrath* has no constitutional authority in railway administration) they have effected satisfactory coöperative arrangements.

548. The railways of Bavaria stand upon a special footing: for Bavaria came into the federation on special terms, reserving an independence much greater than the other states retain in the management of her army, her railways, and her posts and telegraphs.

549. For military purposes, the Empire may command the services of the railways very absolutely. It is as aids to military administration primarily that their proper construction and efficient equipment are insisted on through the Imperial Railway Office. Even the Bavarian railroads may be absolutely controlled when declared by formal imperial legislative action to be of military importance to the Empire. With reference to any but the Bavarian roads a simple resolution of the *Bundesrath* alone suffices for this declaration.

550. The duty of the states to administer their roads as parts of a single system is held to involve the running of a sufficient number of trains to meet all the necessities of passenger and freight traffic, the running of through coaches, the maintenance of proper connections, the affording of full accommodations, etc.

551. At times of scarcity or crisis, the Emperor may, with the advice of the *Bundesrath*, prescribe low tariffs, within certain limits, for the transportation of certain kinds of provisions.

552. **Posts and Telegraphs.** — Here the administrative arrangements of the Empire are somewhat complicated. Bavaria and Württemberg retain their own systems and a semi-independence in their administration, just as Bavaria does with regard to her railways also; being subject to only so much of imperial regulation as brings their postal and telegraphic services into a necessary uniformity with those of the Empire at large. In most of the states the imperial authorities directly administer these services; in a few — Saxony, Saxe-Altenburg, the two Mecklenburgs, Brunswick, and Baden — there is a sort of partnership between the states and the Empire. The principle throughout is, however, that the Empire controls.

553. **Patents, etc.** — Besides the administrative activities with reference to internal affairs which I have mentioned, the Empire issues patents, grants warrants to sea-captains, naval engineers, steersmen, and pilots; and examines sea-going vessels with a view to testing their seaworthiness.

554. **Military and Naval Affairs.** — The Empire as such has a navy, but no troops. Prussia is the only state of the Empire that ever maintained a naval force, and she has freely resigned to the Empire, which she virtually controls, the exclusive direction of naval affairs. But the case is different, in form at least, with the army. That is composed of contingents raised, equipped, drilled, and, in all but the highest commands, officered by the states. This at least is the constitutional arrangement: the actual arrangement is different. Only Bavaria, Saxony, Württemberg, and Brunswick really maintain separate military administrations. The other states have handed over their military prerogatives to the king of Prussia; and Brunswick also has organized her contingent in close imitation of and subordination to the Prussian army. Bavaria's privileges extend even to the appointment of the commander of her contingent. The Emperor is commander-in-chief, however, appointing all the higher field officers; and the imperial rules as to the recruitment, equipment, discipline, and training of troops and as to the qualifications and relative grading of officers are of the most minute kind and are imperative with regard to all states alike.

555. **Finance.** — The expenses of the Empire are met partly from imperial revenues, and partly from contributions by the states. The Empire levies no direct taxes; its revenues come principally from customs duties and excises, certain stamp taxes, the profits of the postal and telegraph system, of imperial railways, of the imperial bank, and like sources. So far as these do not suffice, the states assist, being assessed according to population. And here, again, the states undertake much of the actual work of administration: the customs officials, for example, being state officers acting under imperial supervision. The financial bureaux, like all other branches of the imperial government, are immediately subordinated to the Imperial Chancellor.

556. **Justice.** — In the administration of justice, as in so many other undertakings of government, the Empire superintends,

merely, and systematizes. The state courts are also courts of the Empire: imperial law prescribes for them a uniform organization and uniform modes of procedure: and at the head of the system stands the Imperial Court (*Reichsgericht*) at Leipzig, created in 1877 as the supreme court of appeal. The state governments appoint the judges of the state courts and determine the judicial districts; but imperial laws fix the qualifications to be required of the judges, as well as the organization that the courts shall have. The decisions of the court at Leipzig give uniformity to the system of law.

557. **Citizenship.** — Every citizen of a state of the Empire is a citizen of the Empire also and may enjoy the rights and immunities of a citizen in every part of the Empire; but citizenship, though rooted in the states by way of *locus*, is conferred only upon terms fixed by federal law. The Empire determines in nearly all respects this fundamental question of civil *status;* and every citizen is thereby made the more directly and immediately a citizen of the Empire. It remains, nevertheless, the theory of the relationship that citizenship is primarily state citizenship and that citizenship of the Empire flows out of citizenship of the state, as with us. (Compare secs. 1121, 1124.)

The Government of Prussia.

558. The organization of government in Prussia has, for the student of German political institutions, a double interest and importance. In the first place, Prussia's king is Germany's Emperor; Prussia is the presiding and controlling state of the Empire; and many of her executive bureaux are used as administrative agencies of the Empire. Her government is in a very real sense an organ and representative of the imperial government. In the second place, Prussia's administrative system serves as a type of the highest development of local government in Germany. Prussia has studied to be more perfect than any other European state in her administrative organization.

559. **Stages of Administrative Development.** — Until the time when she emerged from the long period of her development as the Mark Brandenburg and took her place among the great mili-

tary states of Europe, Prussia's administrative organization was of a very crude sort, not much advanced beyond the mediæval pattern. Later, under the Great Elector and his immediate successors, though well out of her early habits, she was still little more than a mere military state, and her administration, though more highly developed, had almost no thought for anything but the army. Only since the close of the Napoleonic wars has her system of government become a model of centralized civil order.

560. **Process of Centralization.** — The Great Elector reduced the feudal Estates of the Mark to complete subjection to his will. He it was, also, who began the policy by which local affairs as well were to be centralized. In the towns the process was simple enough. In them there was little effective obstruction: the channels were already open. There the military authorities, directly representative of the Elector, had all along dictated in police and kindred matters; direct ordinances of the Elector, moreover, regulated taxation and the finances, and even modified municipal privileges at pleasure. It did not take long, such being the system already established, to make burgomasters creatures of the royal will, or to put effective restrictions upon municipal functions.

561. In the provinces, however, it was quite another matter to crush out local privilege. The Prussia of the Great Elector and his successors was no longer the Mark Brandenburg, but the extended Prussia of conquest. There were many Estates to deal with in the several principalities of the kingdom; and these Estates, exercising long-established prerogatives, very stubbornly contested every step with the central power. *They* were the channels through which the sovereign's will had at first to operate upon provincial government, and they were by no means open channels. They insisted, for a long time with considerable success, that the chief officers of the provinces should be nominated by themselves; and they nominated natives, men of their own number. Only by slow and insidious processes did the Elector, or his successors the kings of Prussia, make out of these representative provincial officials subservient royal servants.

562. **First Results of Centralization.** — The system pursued in the process of centralization, so far as there was any system,

was a system by which central control was grafted upon the old growths of local government derived from the Middle Ages. The result was of course full of complexities and compromises. In the vast royal domains *bailiffs* administered justice and police, as did *Schulzen* in the manorial villages. In the larger rural areas a *Landrath*, or sheriff, "nominated by the county nobility, usually from among their own number, and appointed by the king," saw to the preservation of order, to the raising of the levies, to tax collection, and to purveyance. In the towns there was a double administration. Magistrates of the towns' own choosing retained certain narrow local powers, constantly subject to be interfered with by the central authority; but royal tax-commissioners, charged with excise and police, were the real rulers. Above this local organization, as an organ of superintendence, there was in each province a 'Chamber for War and Domains,' which supervised alike the *Landrath* and the city tax-commissioners.

563. A War and Domains Chamber consisted of a president, a "director or vice-president, and a number of councillors proportioned to the size, populousness, or wealth of the province." The president of a chamber was "expected to make periodical tours of inspection throughout the province, as the *Landraths* did throughout their counties." In the despatch of business by a Chamber, the councillors were assigned special districts, special kinds of revenue, or particular public improvements for their superintendence or administration, the whole board supervising, auditing, etc.[1]

564. **Justice and Finance.** — Much progress towards centralization was also made by the organization of justice and finance. "The administration of justice was in the hands of boards, the *Regierungen*, or governments, on the one hand [the whole organization of administration in Prussia being characteristically collegiate], and the courts on the other."

565. In finance also there was promise of systematization. During the period preceding the Napoleonic wars, when Prussia figured as a purely military state, the chief concern of the central government was the maintenance and development of the army. The chief source of revenue was the royal domains: the chief

[1] Tuttle, *History of Prussia*, Vol. III., pp. 107–109.

need for revenue arose out of the undertakings of war.[1] There were, therefore, at the seat of government two specially prominent departments of administration, the one known as the 'General War Commissariat,' and having charge of the army, the other known as the 'General Finance Directory,' commissioned to get the best possible returns from the domains; and here and there throughout the provinces there were 'War Commissariats' and 'Domains Chambers' which were the local branches of the two great central departments.[2] These two departments and their provincial ramifications were, however, instead of being coördinated, kept quite distinct from each other, clashing and interfering in their activities rather than coöperating.

566. **Fusion of Departments of War and Domains.** — Such at least was the system under the Great Elector and his immediate successor, Frederic I., if system that can be called which was without either unity or coherence. Frederic William I. united War and Domains under a single central board, to be known as the 'General Supreme Financial Directory for War and Domains,' and brought the local war and domains boards together in the provinces as Chambers for War and Domains. Under this arrangement the various 'war councillors' who served the provincial Chambers were charged with a miscellany of functions. Besides the duties which they exercised in immediate connection with military administration, they were excise and police commissioners, and exercised in the cities many of the civil functions which had formerly belonged to other direct representatives of the Crown. In the rural districts the Chambers were served in civil matters by the several *Landräthe*.

567. **Differentiation of Central Bureaux.** — This arrangement speedily proved as cumbrous as the name of its central organ, and an internal differentiation set in. The General Directory separated into Committees; and, as time went on, these committees began to assume the character of distinct Ministries, — though upon a very haphazard system. Frederic the Great further confused the system by creating special departments immediately

[1] The army consumed about five-sevenths of the entire revenue.

[2] Seeley, *Life and Times of Stein*, Vol. I., Chap. II. Also Tuttle, Vol. I., pp. 421, 422.

dependent upon himself and a special cabinet of advisers having no connection with the General Directory. He was himself the only cohesive element in the administration: it held together because clasped entire within his hand.

568. **Reforms of Stein and Hardenberg.** — Order was at last introduced into the system through the influence of Baron vom Stein and the executive capacity of Count Hardenberg, the two most eminent ministers of Frederic William III., who together may be said to have created the present central administration of Prussia. Prussia owes to the genius of Stein, indeed, the main features of both her central and her local organization. Her central organization is largely the direct work of his hands; and her local organization derives its principles from his thought not only, but also from the provisions of the great Ordinance by which he reconstructed the administration of the towns.

569. Prussian administrative arrangements as they now exist may be said to be in large part *student-made*. As the Roman emperors honored the scientific jurists of the Empire by calling upon them to preside over legal development, so have Prussian kings more and more inclined to rely upon the advice of cultured students of institutions in the organic development of the government. Stein was above all things else a student of governments. In our own day the influence of Professor Gneist upon administrative evolution has continued the excellent tradition of student power. And because she has thus trusted her students, Prussia has had practical students: students whose advice has been conservative and carefully observant of historical conditions.

570. Of course it is much easier to give such influence to students where the government follows for the most part royal or executive initiative than where all initiative rests with a popular chamber. It is easier to get and to keep the ear of one master than the ears of five hundred.

571. **Reform of Local Government before 1872.** — The county law (*Kreisordnung*) of the 13 December, 1872, has been called the *Magna Charta* of Prussian local government. Upon it all later changes and modifications rest. Between the period of Stein's reforms and the legislation of 1872 the organization of local government was substantially as follows:[1] The provinces were divided into 'Government Districts,' as now, the Govern-

[1] See R. B. D. Morier's essay on *Local Government in Germany*, in the volume of *Cobden Club Essays* for 1875.

ment Districts into 'Circles' or Counties. An administrative Board established in the Government District was then, as now, the vital organ of local administration. In the province there was also a board, exercising general supervisory powers, the eye of the central bureaux in the larger affairs of administration, the affairs, that is, which extended beyond the area of a single Government District; and, as the chief officer of the province, a 'Superior President' of influential position and function. But alongside of this quite modern machinery stood the old provincial Estates (revived in 1853), representing, not the people, but the social orders of a by-gone age, and possessing certain shadowy powers of giving advice. In the 'Circle' or County, there was still the *Landrath*, as formerly, appointed from a list of local landed proprietors, and associated with the 'Estates of the Circle,' a body composed of the county squires and a few elected representatives from the towns and the rural townships, — a body of antiquated pattern recalled to life, like the Estates of the province, in 1853. In the towns, which had directly received the imprint of Stein's reforming energy and sagacity, administration was conducted by boards of magistrates chosen by popular councils and associated with those councils in all executive business by means of a joint-committee organization, the burgomasters being presidents rather than chief magistrates.

572. **Landgemeinde and Manors.** — Besides these areas of administration there were rural communes (*Landgemeinde*) still connected, quite after the feudal fashion, with adjacent or circumjacent manors, their government vested in a *Schulze* and two or more *Schöffen* (sheriffs or justices), the former being appointed either by the lord of the manor, or, if the village was a free village, as sometimes happened, by the owner of some ancient freehold within the commune with which manorial rights had somehow passed. The commune had, besides, either a primary or an elective assembly. The communes were often allowed, under the supervision of the official board of the Government District, to draw up charters for themselves, embodying their particular local laws and privileges. Within the manors police powers, poor-relief, the maintenance of roads, etc., rested with the proprietor. Local government was within their borders private government.

573. **Reform of 1872.** — The legislation of 1872 took the final steps towards getting rid of such pieces as remained of the anti-

quated system. It abolished the hereditary jurisdiction of the manor and the dependent office of *Schulze*, and established in place of the feudal *status* an equal citizenship of residence. In place of the Estates of the province and county it put real representative bodies. It retained the *Landrath*, but somewhat curtailed his powers in the smaller areas within the Circle, and associated with him an effective administrative board, of which he became little more than president. It carried out more thoroughly than before in the various areas the principle of board direction, integrating the lesser with the greater boards, and thus giving to the smaller areas organic connection with the larger. It reformed also the system of local taxation. It is upon this legislation, as I have said, that the system of local government now obtaining in Prussia is erected[1] (secs. 588, 618).

574. **The Central Executive Departments.** — Stein's scheme for the development of the central organs of administration brought into existence five distinct ministries, which no longer masqueraded as committees of a cumbrous General Directory, and whose functions were distributed entirely upon a basis of logical distinction, not at all upon any additional idea of territorial distribution. These were a Ministry of Foreign Affairs, a Ministry of the Interior, a Ministry of Justice, a Ministry of Finance, and a Ministry of War. This, however, proved to be by no means a final differentiation. The Ministry of the Interior was at first given a too miscellaneous collection of functions, and there split off from it in 1817 a Ministry of Ecclesiastical, Educational, and Sanitary Affairs, and in 1848 a Ministry of Trade, Commerce, and Public Works and a Ministry of Agriculture. In 1878 a still further differentiation took place. The Ministry of Finance, retaining distinct reminiscence of its origin in the administration of the royal domains, had hitherto maintained a Department of Domains and Forests. That department was in 1878 transferred to the Ministry of Agriculture. At the same time the Ministry of Trade, Commerce, and Public Works was divided into two, a Ministry of Trade and Commerce and a Ministry of Public Works.

[1] Morier, p. 434.

575. There are now, therefore, nine ministries: (1) a Ministry of Foreign Affairs (Stein, 1808); (2) a Ministry of the Interior (1808); (3) a Ministry of Ecclesiastical, Educational, and Sanitary Affairs (1817); (4) a Ministry of Trade and Commerce (1848); (5) a Ministry of Agriculture (1848), Domains, and Forests (1878); (6) a Ministry of Public Works (1878); (7) a Ministry of Justice (1808); (8) a Ministry of Finance (1808); and (9) a Ministry of War (1808).

576. **The Council of State.** — Most of these ministries were created before Prussia had any effective parliamentary system, and when, consequently, there was no instrumentality in existence through which there could be exercised any legislative control over the executive. Stein would have revived for the exercise of some such function the ancient Council of State (*Staatsrath*) founded by Joachim Friedrich in 1604, which had at first presided over all administration but whose prerogatives of oversight and control had gradually decayed and disappeared. This council, which bore a general family resemblance to the English Privy Council (sec. 854), had a mixed membership made up in part of princes of the blood royal, in part of certain civil, military, and judicial officials serving *ex officio*, and in part of state officials specially and occasionally summoned. It was Stein's purpose to rehabilitate this body, which was in a sense representative of the classes standing nearest to government and therefore presumably best qualified to test methods, and to set it to oversee the work of the ministers: to serve as a frame of unity in the administration without withdrawing from the ministers their separate responsibility and freedom of movement. This part of his plan was not, however, carried out, and the Council of State, though still existing, a shadow of its former self, has never regained its one-time prominence in administration.

577. **Staatsministerium.** — Instead of adopting Stein's plan, Count Hardenberg integrated the several ministries by establishing the *Ministry of State*, or College of Ministers (*Staatsministerium*), which stands in much the same relation to Prussian administration that the French Council of Ministers (sec. 422) occupies towards administration in France, though it in some respects resembles also the French Council of State (sec. 468). It is composed of the heads of the several ministries and meets, once a week or oftener, for the consideration of all matters which concern all the executive departments alike, to discuss proposed general laws or constitutional amendments, to adjust conflicts between departments, to hear reports from the ministers as to their policy in the prosecution of their separate work, to exercise a certain oversight over local administration, to concert measures

to meet any civil exigency that may arise, etc. It serves to give unity and coherence to administration.

578. **The Supreme Chamber of Accounts.** — The same purpose is served by the Supreme Chamber of Accounts (*Oberrechnungskammer*) and by the Economic Council (*Volkswirthschaftsrath*). The Supreme Chamber of Accounts was founded in 1714 by Frederic William I. Its members have the tenure and responsibility of judges. Its president is appointed by the Crown on the nomination of the Ministry of State; its other members are appointed by the Crown upon the nomination of its president, countersigned by the president of the Ministry of State. It constitutes a distinct branch of the government, being subordinate, not to the Ministry of State, but directly responsible to the Crown. Its duty is the careful oversight and revision of the accounts of income and expenditure from all departments; and the oversight of the state debt and of the acquisition and disposition of property by the state. It watches, in brief, the detailed administration of the finances, and is the judicial guardian of the laws concerning revenue and disbursement.

579. **The Economic Council.** — The Economic Council considers proposals for laws or ordinances affecting weighty economic interests which fall within the domains of the three ministries of Trade and Commerce, of Public Works, and of Agriculture. Such proposals, as well as the proposals for the repeal of such laws and ordinances may be submitted to its debate before going to the king for his approval. It is also privileged to consider the question how Prussia's votes shall be cast upon such matters in the *Bundesrath*. Of course, however, its part in affairs is merely consultative. It is composed of seventy-five members appointed by the king for a term of five years, forty-five of this number being appointed upon the nomination of various chambers of commerce, mercantile corporations, and agricultural unions.

580. **The Ministers in the Legislature.** — The king — or, more properly, the Administration — is represented in the legislative houses by the ministers, who need not be members in order to attend and speak on the public business.

581. **The Landtag: the House of Lords.** — The Prussian *Landtag*, or Legislature, consists of two houses, a House of Lords (*Herrenhaus*) and a House of Representatives (*Abgeordnetenhaus*). The House of Lords might better be described as a house of classes.

It contains not only hereditary members who represent rights of blood, but also life members who represent landed properties and great institutions, and officials who represent the civil hierarchy. There sit in it princes of the blood royal nominated to membership by the king; the heads of families once royal whose domains have been swallowed up by Prussia; certain greater noblemen appointed by the Crown, together with eight others elected by the resident landowners of the provinces; the four chief officials of the province of Prussia (the Supreme Burggraf, the High Marshal, the Grand Master of the Teutonic Order, and the Chancellor); and a great number of life members appointed by the king upon the presentation of various bodies: certain evangelical foundations, namely, certain colleges of counts, and of landholders of great and ancient possession, the nine universities, and forty-three cities which have received the right of nomination. The king may, besides, issue special summons to sit in the House of Lords to such persons as he thinks worthy. There is no limit placed upon the number of members, — the only restriction concerns age: members must be at least thirty years old.

582. At present (1897) the number of members is about three hundred. Of these quite one-third are of the landed nobility, and almost as many more are the nominees of the landed classes; so that the House stands for loyalty to the Crown and opposition to liberal change.

583. **The House of Representatives**, though in a sense representing every Prussian twenty-five years of age who is not specially disqualified to vote, is not constituted by a direct popular franchise, or even by an equal suffrage. The vote is indirect and is proportioned to taxable property. The country is divided into districts; the qualified voters of each district are divided into three classes in such a way that each class shall represent one-third of the taxable property of the district; each of these classes selects by vote a third of the number of electors to which the district is entitled; and the electors so chosen elect the members of the House of Representatives.

584. **The Electoral System.** — One elector is chosen for every two hundred and fifty inhabitants; the voting is not by the ballot, but is public, and an absolute majority of the electors is required to elect. The total number of members of the House is 433. The term is five years. Any

Prussian who is thirty years of age and in full possession of civil rights may be chosen. In case a vacancy occur in the House, no choice of electors is necessary. Once chosen, the electors are competent to act throughout the legislative term.

585. It need hardly to be remarked that the division of the primary voters into classes according to the amount of taxes they pay gives a preponderance to wealth. The three classes are of course very unequal in numbers. It requires a comparatively small number of rich men to represent one-third of the taxable property in a district; it takes a considerably larger number of the well-to-do to represent another third; and the last third will be represented by the great majority of the inhabitants of the district. For the classes are not constituted with a view to distributing the small taxpayers and equalizing the classes numerically. Those who pay most taxes constitute the first class; those who pay less, the second; those who pay least or none, the third; and it may thus very well happen that a very small number of persons elects a third of the electors.

586. **Equality and Competence of the House.** — The consent of both Houses is necessary to the passage of a law, and they stand upon a perfect equality as regards also the right of initiative in legislation, — except that all financial measures must originate in the lower house, and that the upper house can pass upon the budget, which must be presented first to the House of Representatives, only as a whole. The Lords cannot amend the budget in part when it comes up to them: they must accept or reject it entire.

587. **The King's Power of Adjournment and Dissolution.** — The king may adjourn the House of Representatives for a period not exceeding thirty days, once during any one session without its consent. He may also dissolve it. When a dissolution is resorted to he must order a new election within sixty days, and the newly elected House must assemble within ninety days. (Compare sec. 415.)

588. **Local Government.** — The organization of local government in Prussia is rendered complex by a mixture of historical and systematic elements: it is compounded of old and new, — of the creations of history and the creations of Stein and Gneist. Stein's hand is even more visible in local organization in Prussia than in the organization of the central ministries. More conservative than the Constituent Assembly and Napoleon in France, he did not sweep away the old provinces of Prussia, whose bounda-

ries, like those of the French provinces of the old *régime*, were set deep in historical associations. The twelve provinces were given a place, — a function of superintendence, — in the new system established. The country is, indeed, divided into Districts (*Bezirke*) corresponding in general character and purpose with the French Departments; but these Districts are grouped under a superintendent provincial organization. There are, therefore, in Prussian local organization (1) the Province, (2) the Government District, (3) the Circle (*Kreis*) or County, and (4) the township and the town. The township and the town are, as we shall see, coördinate, standing, not in subordination to each other, but in the same rank of the series.

589. The usual organs of local government throughout all the series of the Prussian system are "first, a representative body with an exclusive control over the economic portion of the communal business; secondly, an executive board with an exclusive control over the public portion of the communal business; thirdly, mixed committees, composed of members of both bodies, for the ordinary management of the affairs of the community; fourthly, the division of the communal area into administrative districts under overseers responsible to the executive board."[1]

590. **The Province.** — There are in the Province two sets of governmental organs: one of which represents the state and its oversight, the other the Province and its self-government. (1) The state is represented by a Superior President and a *Provinzialrath* associated with him. The original purpose in retaining the provincial organization was to secure broad views of administration through officials charged with the oversight of extended areas and so elevated above the near-sightedness of local routine and detail. Nearer to the particulars of local administration than the minister at Berlin, but not so near as the officials of the Government Districts, the provincial representatives of the state are charged with the care "of all such affairs as concern the entire province or stretch beyond the jurisdiction of a single [district] administration."[2] These are such matters as affect

[1] R. B. D. Morier, *Cobden Club Essays* (1875) on *Local Government and Taxation*, p. 433.

[2] Schulze, *Das Staatsrecht des Königreichs Preussen* (in Marquardsen's *Handbuch*), p. 63.

imperial interests or the whole Prussian state; the concerns of public institutions whose functions extend beyond a District; insurance companies; extensive plans of improvement; road and school management, etc. In exercising most of these functions the provincial authorities act, however, not through officers of their own, but through the District Administrations. There lies with the Superior President, also, the duty of overseeing district administration, the provincial tax directors, and the general Commission for the regulation of the relations between landlords and tenants. He represents the central government, too, in all special, occasional duties, and under all extraordinary circumstances. He has, besides, initial jurisdiction in cases of conflict between District Administrations, or between such Administrations and specially commissioned officials not subject to their orders.

591. The extraordinary powers of the 'Superior President' are illustrated by the fact that, in case of serious civil disturbance, of war or the danger of war, he is authorized to assume the whole authority of administration, local as well as general, within the Province.

592. In overseeing the District Administration, however, he has no executive, but only advisory, powers. He is merely the eye of the Ministries at Berlin, advising them of all matters needing their action. Like the French Prefect, he is the servant of all Ministries alike, though most directly and intimately associated with the Ministry of the Interior.

593. The defect of the provincial organization in Prussia is said to be lack of vitality. Critics like Professor Gneist thought that it rendered the system of local government cumbrous without adding to its efficacy. It is too much restricted to gratuitous advice, and too little authorized to take authoritative action.

594. The *Provinzialrath,* the administrative Council associated with the Superior President, consists, besides the President or his representative as presiding officer, of one professional civil official of high rank, appointed by the Minister of the Interior, practically for life, and of five lay members chosen by the Provincial Committee for a term of six years. The assent of the *Provinzialrath* is necessary to every ordinance issued by the Superior President.

595. (2) The organs representing the Province and its self-government are the Provincial *Landtag,* the Provincial Committee, and the *Landeshauptmann* or *Landesdirektor.* In a Prussian law

concerning local government the province is described as "a communal union established with the rights of a corporation for self-government of its own affairs."[1] The provincial legislative body, the *Landtag*, is composed of representatives elected from the Circles or Counties by the Diets of the Circles: for, when looked at from the point of view of self-government, the Province is a union of Circles, not of Districts: the Districts, as we shall see, are organs of the central government only. The functions of the *Landtag* lie within the narrow field of such matters as the apportionment of taxes among the Circles (which in their turn apportion them among individuals), the examination of the local budget, the care of provincial property, and the election of certain officials, — though it is at liberty to take cognizance of anything that is of local concern.

596. It may also, on occasion, give its opinion on bills concerning the Province and on other matters referred to it, for an expression of opinion, by the authorities at Berlin. The Superior President may be present at its sessions and may annul all acts in which it oversteps its jurisdiction. Its by-laws are subject to the Crown's approval, as are also many of its votes of appropriation; and the king may dissolve it.

597. The *Landtag* elects the Provincial Committee and the *Landeshauptmann*, who are the executive organs of provincial self-government. The *Landeshauptmann* and the Committee stand related to each other very much as do the Superior President and *Provinzialrath*, or the French Prefect and the Prefectural Council: the *Landeshauptmann* is the executive, the Committee the advisory organ of local self-administration, though it in effect directs the action of the *Landeshauptmann* in most matters.

598. The spheres of the representatives of the state and of the representatives of local self-government are quite sharply distinguished in Prussia. The Provincial Committee and the *Landeshauptmann* have nothing to do with the general administration: that is altogether in the hands of the Superior President and the *Provinzialrath*, who on their part have nothing to do with local self-government. The sphere of local self-government, though narrow, is somewhat more guarded against the constant interference of the central authorities in Prussia than in France. (Compare sec. 454.)

[1] Schulze, *Das Staatsrecht des Königreichs Preussen* (in Marquardsen's *Handbuch*), p. 85.

599. **Communal Estates.** — In some Provinces there still exist certain corporations, representing the old organization by 'estates' of independent districts, which retain their '*landtag*,' their separate property, and a small part of their privileges. They constitute rural poor-unions, and play a limited part in local administration according to the sharply explicit laws of incorporation under which they now exist. They are, however, being gradually abolished or transformed by special enactments. Their German name is *Kommunal-standische Verbände*, which may be translated, Unions of Communal Estates.

600. **The Government District** (*Regierungsbezirk*). — Unlike the Province, the Government District has no organs of self-government: it is exclusively a division of *state* administration. Its functionaries are the principal, — it may even be said the universal, — agents of the central government in the detailed conduct of administration: they are charged with the local management of all affairs that fall within the sphere of the Ministries of the Interior, of Finance, of Trade and Commerce, of Public Works, of Agriculture, of Ecclesiastical and Educational Affairs, and of War, exclusive, of course, of such matters as are exceptionally entrusted to officers specially commissioned for the purpose. In brief, they serve every ministry except the Ministry of Justice.

601. Collectively the functionaries of the District are called the 'Administration' (*Regierung*), and their action is for the most part collegiate, *i.e.*, through Boards. The exception to this rule concerns matters falling within the province of the Ministry of the Interior. That Ministry acts in the District, not through a board of officials, but through a single official, the President of the Administration (*Regierungspräsident*). In dealing with all other matters the action is collegiate; but the Boards are not independent bodies: they are divisions (*Abtheilungen*) of the 'Administration' taken as a whole, and in certain affairs of general superintendence the 'Administration' acts as a single council (*im Plenum*). Each Board is presided over by a 'Superior Administrative Councillor' (*Oberregierungsrath*); and that on Domains and Forests has associated with it a special functionary known as the Forest-master. The members of the 'Administration' are all appointed by the central government, which places upon the Boards whose functions require for their proper discharge a special training certain so-called "technical members":

for instance, school experts, medical experts, road-engineers, and technically instructed forest commissioners.

602. These 'Administrations' have taken the place of the old-time War and Domains Chambers of which I have spoken (sec. 565), and which, like the Administrations, acted through Boards as a sort of universal agency for all departments of government. It is only since 1883 that the affairs of the Interior have been given into the sole charge of the President of the Administration. Before that date they also were in the hands of a Board.

603. "Every head of a department, as well as every *Rath* and assessor, is bound each year to make a tour through a portion of the district, to keep an official journal of all he sees, to be afterwards preserved amongst the records of the Board, and thus to make himself practically acquainted with the daily life and the daily wants of the governed in the smallest details."[1] (Compare sec. 563.)

604. **The President of the Administration** (*Regierungspräsident*) is the most important official in the Prussian local service. Not only does he preside over the 'Administration,' the general and most important agency of local government; he is also equipped for complete dominance. He may, upon occasion, annul the decisions of the 'Administration' or of any of its Boards with which he does not agree, and, in case delay seems disadvantageous, may himself command necessary measures. He may also, if he will, set aside the rule of collegiate action and arrange for the *personal* responsibility of the members of the 'Administration,' whenever he considers any matter too pressing to await the meeting and conclusions of a Board, or, if when he is himself present where action is needed, he regards such an arrangement as necessary.[2] In brief, he is the real governing head of local administration. The jurisdiction of the 'Administration' covers such matters as the state taxes, the churches, the schools, and the public domain.

605. **The District Committee.** — Although, as I have said, the Government District is not an area of self-government, a certain part in the oversight of governmental action in the District is given to lay representatives chosen by the provincial agents of the people. A District Committee (*Bezirksausschuss*), composed

[1] Morier (*Cobden Club Essays*), p. 422.
[2] Schulze (in Marquardsen), p. 64.

of two professional members (one of whom must be qualified for judicial office, the other for the higher grades of the administrative service) appointed by the king for life, and of four members chosen by the Provincial Committee (sec. 597) for a term of six years, is allowed an oversight of such matters as it has been thought best to put under lay supervision. The President of the Administration is *ex officio* a member of the Committee and usually presides over its sessions. All orders or arrangements which he wishes to make with regard to local police are subject to its confirmation, and all questions regarding the control of subordinate local authorities fall to it. More important than its administrative functions are the judicial functions with which it has been recently invested. Since 1883 the District Committee has been the Administrative Court of the District (sec. 628). When acting in this capacity the Committee is presided over by its judicial member, and the President of the Administration does not sit with it.

606. The Government Districts number thirty-five, and are grouped, as I have said, within the twelve Provinces.

607. **The Circle** (*Kreis*). — In the Circle, as in the Province, there emerges a double set of functions: there is the state administration and, alongside of it, the narrower function of self-government. This double set of functions is performed, however, by a single set of functionaries: by a professional officer known as the *Landrath*, associated with a Circle Committee (*Kreisausschuss*), which acts by delegation for the Diet of the Circle (*Kreistag*), the consultative and supervisory authority. There are not, as in the Province, one council and one executive for the state, another council and another executive for the locality.

608. **The Landrath and the Circle Committee.** — The *Landrath* stands upon a peculiar footing: his office is ancient and retains some of its historical features. Originally the *Landrath* represented the landed gentry of various districts of Brandenburg; he was appointed upon their nomination and in a sense represented their interests. In some parts of Prussia traces of this right of presentation to the office by the landowners still remain; and in almost all parts of the kingdom the privilege of nomination

has been transferred to the Circle Diet, as heir of the control once exercised by the local lords of the soil. The *Landrath* is, therefore, formally, the representative of the locality in which he officiates. In reality, however, he is predominantly the agent of the state, serving both the District Administration and the departments at Berlin. He is appointed by the Superior President of the Province in which the Circle lies, and is always a professional officer who has passed, by examination, into the higher grades of the civil service. He is chief of police within the Circle, and superintendent of all public affairs. The Circle Committee is associated with him in the administration of his office and organized under his presidency. It consists, besides himself, of six members chosen by the Circle Diet. It constitutes the Administrative Court of the Circle (sec. 628), hearing appeals from the acts of subordinate officials as well as supervising administrative action.

609. **The Diet of the Circle** represents, not the people, but groups of interests, — is based upon the economical and social relations of the people. Each Circle includes all towns lying within it which have less than 25,000 inhabitants, and representation in the Diet is divided between town and country. The country representation, in its turn, is divided between the rural Communes and the greater landowners.

610. The cities elect representatives either singly or in groups; if singly, through their magistrates and councils acting together; if in groups, through electors who assemble under the Presidency of the *Landrath*. As 'greater landowners' are classed all those who pay, in their own right, 75 thalers annual land or building tax; and these are organized for electoral purposes in Unions (*Verbände*). The rural Communes elect in groups through electors. The term of members of the Circle Diet is six years. Cities having more than 25,000 inhabitants constitute separate Circles, and combine in their town governments both Circle and Commune under the forms of city government.

611. **The Circle the Basis of Local Government.** — A moment's review of the electoral arrangements which underlie Prussian local government as I have outlined it will show how literally the whole structure, so far as it is a system of self-government, rests upon the electoral organization of the Circle. The Diet of

the Circle is the only representative body I have yet named which is chosen by the qualified voters of the locality: and it is not chosen directly. The larger towns elect their quota of members through their councils, while the smaller towns unite and choose through electors. The rural Communes elect in groups, through electors. The greater landowners send their separate quota. And then from the Circle Diet, when once it is chosen, proceed, indirectly, all the other lay bodies of administration in the larger areas. It nominates the *Landrath*, elects the Circle Committee, and unites with the Diets of the other Circles of the Province in choosing the provincial *Landtag*. The provincial *Landtag*, in turn, elects the *Landeshauptmann* and the Provincial Committee. The Provincial Committee elects five out of the seven members of the *Provinzialrath* and four out of the six members of the District Committee. Each Provincial Committee chooses, on an average, two District Committees. It is in only a very restricted sense a system of popular control in local affairs. It is a long way from the people to the District Committee.

612. **The Magisterial District** (*Amtsbezirk*). — The rural Communes are grouped in Magisterial Districts containing each about fifteen hundred inhabitants; and each District is presided over by a Reeve or Justice (*Amtsvorsteher* or *Amtsmann*) who is appointed by the king upon the nomination of the Circle Diet, usually from among the landowners of the locality. The Reeve's term is six years. He is given charge of the police of the District, and is entrusted with the administration of the laws for the relief of the poor and the preservation of health. As police commissioner he is put over the mayors of the several Communes within his district. He acts under the supervision of the Committee of the Circle.

613. **The Rural Commune** (*Landgemeinde*). — The larger rural Communes act through small representative assemblies or councils, while the less populous regulate their affairs by mass meeting. In some Communes the executive officer is known as 'mayor,' in others as 'village judge,' in still others as 'president.' In most localities he is assisted by one or more aids or assessors. The electoral privilege is based upon the three-class system of voting described in secs. 583–585, except that those who pay no taxes at all are usually excluded from the franchise. The powers of the Communes cover all matters of strictly local interest.

614. **The City Communes** (*Stadtgemeinde*). — Among the City Communes there is great variety of organization. In some cities there is a single executive, — a single Burgomaster, — perhaps assisted by certain Boards; in others the Burgomaster has colleagues; in still others the magistracy is collegiate, — is itself a Board. In all there are councils more or less directly representative of the people. In the cities, as in every other unit of local administration, the subjects of finance, police, and the military are largely controlled from Berlin; and in these branches of administration the city governments are agencies of the central government. They thus have a double character; they are at one and the same time representatives of the authorities at the capital and of the citizens at home. When acting as agencies of state administration they are, of course, responsible to the central Departments at Berlin.

615. There is in Prussian local organization none of the extreme, the rather forced uniformity so noticeable in France, where no difference is made between rural Communes and City Communes, only the greater cities, like Paris and Lyons, being given a special organization. In Prussia historical and other grounds of variety have been freely observed.

616. **General Principles of Prussian Town Government.** — Although without uniformity of structure, town government in Prussia has certain uniformities of principle at its basis which render it a striking example of active self-government. The mayor of a Prussian city is a trained official, taken from the professional service; but he is not the Executive; he is simply president of the executive. There is associated with him a board of Aldermen most of whose members are elected from the general body of citizens, to serve without salary, but an important minority of whose members are salaried officials who, like the mayor, have received a thorough technical training in their various branches of administration, and whose tenure of office is in effect permanent: and this board of Aldermen is the centre of energy and rule in city government. But it acts under check. A town council represents the citizens in the exercise of a control over the city budget, and citizens not of the Council as well as Councilmen act with the Aldermen in the direction of executive business. The Aldermen do their administrative work in Committees,

and act always in association with certain delegations of town-councilmen and certain 'select citizens' named by the council. In the wards of the larger towns the Aldermen command also the assistance of local committees of citizens, by whom the conditions and needs of the various districts of the town are familiarly known. Thus in the work of poor relief, in the guardianship of destitute orphans, in education, and in tax assessment 'select citizens' commonly reinforce the more regular, the official, corps of city officers. This literal self-government, which breaks down the wall of distinction between the official and the non-official guardian of city interests and presses all into the service of the community, is not optional; it is one of the cardinal principles of the system that service as a 'select citizen' is to be enforced by penalties,— by increasing the taxes of those who refuse to serve.

617. Berlin "governs itself through more than ten thousand men belonging to the wealthier part of the middle classes." [1] The citizens chosen for ward work or for consultation with the central committees of Aldermen and town-councillors include merchants, physicians, solicitors, manufacturers, head-masters of public schools, and like representative persons.

618. The three-class system of voting described in secs. 583, 584, and 585 obtains also in all municipal elections in Prussia, so that weight in the electoral control of city affairs is proportioned to tax-assessment. One-third of the elected Aldermen and town-councillors represent the wealthy class, one-third the middle class, one-third the 'proletariat.' It is said that in Berlin the first class contains "less than two per cent of the voters, the second class less than thirteen per cent, and the third eighty-six per cent." The arrangement breeds a deep discontent in the lowest class and they largely refrain from voting.

619. **The Administration of Justice.** — The Prussian courts of justice, like those of the other states of the Empire, have the general features of their organization and jurisdiction prescribed by imperial law (sec. 556). They are Prussia's courts; but they also serve as courts of the Empire; Prussian law commands only their *personnel* and their territorial competence. At the head of the system sits the supreme court of the Empire (*Reichsgericht*), to which the courts of all the other states stand subordinated.[2]

[1] Professor Gneist, *Contemporary Review*, Vol. 46 (1884), p. 777.

[2] Prussia is vouchsafed by imperial law the privilege of retaining her own supreme court; but she has not availed herself of the permission.

In each Province there is a Superior District Court (*Oberlandesgericht*), and, next below it, a District Court (*Landgericht*). In each magisterial District there is an *Amtsgericht*.

620. The *Amtsgericht*, which is the court of first instance in minor civil cases, consists of one or of several judges, according to the amount of business there is for the court to despatch: for when there is more than one judge the work is not handled by them together, but separately; it is divided, either logically or territorially.

621. The higher courts, the District Court, and the Superior District Court consists each of a number of judges. At the beginning of each year, the full bench of judges in each court determine a division of the business of the court among themselves, constituting themselves in separate 'chambers' for separate classes of cases. There is always a 'civil chamber' and a 'criminal chamber,' and often a chamber for commercial cases (*Kammer für Handelssachen*). Each chamber has its own president and its own independent organization.

622. Minor criminal cases are tried in sheriffs' courts (*Schöffengerichte*) sitting in the Magisterial Districts; more serious offences by the criminal chamber of the District Court; all grave crimes by special jury-courts (*Schwurgerichte*) which sit under the presidency of three judges of the District Court.

623. An appeal from a sheriff's court on the merits of the case can go no further than the District Court. Appeals on the merits of the case from the criminal chamber of the District Court are not allowed; but a case can be taken from that court on the ground of the neglect of a rule of law to the Superior District Court, and on other legal grounds to the Imperial Court, for revision.

624. The nomination of all judges rests with the king: but the appointment is for life and the judges stand in a position of substantial independence. The Minister of Justice, however, completely controls all criminal prosecutions: for no criminal prosecution can be instituted except by the states-attorneys who represent the government in the several courts, and these hold their offices by no permanent tenure, but only at the pleasure of the Minister.

625. Purity in the administration of justice is sought to be secured by public oral proceedings. Until a very recent period all proceedings in the Prussian courts were written: the plea and the answer constituted the suit. Now public oral proceedings are made imperative.

626. The organization of justice in Prussia provides for the assumption by the state of a certain 'voluntary' jurisdiction, some of which, such as the exercise of guardianship and the probate of wills (which latter is made a function of the *Amtsgericht*) are quite familiar to the practice of other countries; but others of which, such as an oversight over certain feudal interests, are somewhat novel in their character. The system knows also certain officially commissioned Arbitrators (*Schiedsmänner*) and certain trade judges, which are in some respects peculiar to itself.

627. **Administrative Courts** (*Verwaltungsgerichte*). — The same distinction between administrative and ordinary courts of justice that we have observed in France obtains also in Prussia (sec. 468). Here again appears the organizing hand of Stein. He established for Prussia the principle that cases arising out of the exercise of the state's sovereignty should be separated in adjudication from cases between private individuals and should be allotted to special courts. Such are cases of damage done to an individual through the act of an administrative officer, or cases of alleged illegal action on the part of a public official, — in brief, all cases of conflict between the public power and private rights, as well as all questions between administrative authorities.

628. The courts charged with this jurisdiction are, (1) in the Circle, the *Circle Committee* (sec. 608), presided over, as in dealing with other matters, by the *Landrath*, and in the cities which themselves constitute Circles, the *City Committee* (*Stadtausschuss*), consisting of the Burgomaster as president and four members, all of whom must be qualified for judicial service or for the higher grades of administrative office, elected by the magistracy of the city, acting collegiately, for a term of six years. (2) In the Government District, the *District Committee* (sec. 605), to whose presidency when sitting in this capacity, the king may appoint, as representative of the President of the Administration, one of the members of the 'Administration' under the title of Director of the Administrative Court (*Verwaltungsgerichtsdirektor*). (3) The *Superior Administrative Court* in Berlin (*Oberverwaltungsgericht*), whose members are appointed by the king, with the con-

sent of the Council of Ministers, for life. This court stands upon the same footing of rank with the supreme federal tribunal, the *Reichsgericht*. Its members must be qualified, half of them for high judicial, half for high administrative office. It acts, like the other courts, in divisions or 'senates,' each of which has its separate organization; and these sections come together only for the settlement of certain general questions. (Compare sec. 468.)

629. **The Court of Conflicts** (*Gerichtshof für Kompetenz-konflikte*). — Between the two jurisdictions, the ordinary or private and the administrative, stands, as in France, a Court of Conflicts. It consists of eleven judges appointed for life (or for the term of their chief office, in case they act *ex officio*); and of these eleven six must be members of the Superior District Court of Berlin, — must belong, that is, to a court of the ordinary jurisdiction. The other five must be persons eligible to the higher judicial or administrative offices. (Compare sec. 475.)

630. **The Prussian Courts and Constitutional Questions.** — The Prussian courts have no such power of passing upon the constitutionality of laws as is possessed by the courts of the United States. They cannot go beyond the simple question whether a law has been passed, or, in administrative cases, an official order issued, in due legal form.

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Start for Friday.

VIII.

THE GOVERNMENTS OF SWITZERLAND.

631. **Feudalism in Switzerland.** — Until the beginning of the fourteenth century the towns and communes of the country now called Switzerland were all held fast in the meshes of the feudal system. Real vassalage, indeed, such as the low countries of France and Germany knew, had never penetrated to all the valleys of the Alps; many a remote commune had never known anything but a free peasantry; and hardly anywhere near the heart of the great mountains had feudal fealty meant what it meant elsewhere. Still great neighbor lords and monasteries had swept even these mountain lands at least nominally within their overlordships, and most of the Swiss Cantons of to-day represent pieces of old feudal domains.

632. **First Movements towards Cantonal Independence.** — In 1309, however, began the process which was to create the Switzerland of our time. In that year the Cantons of Schwyz, Uri, and Unterwalden, lying close about the lake of Lucerne, won from the Emperor Henry VII. the recognition of their freedom from all supremacy save that of the Empire itself. They had already, about the middle of the thirteenth century, drawn together into a league which was to prove the seed of the modern Confederacy. That Confederacy has two distinguishing characteristics. It has brought down to us, through an almost unbroken tradition, the republican institutions of the Middle Ages; and it has by slow processes of cautious federation drawn together into a real union communities the most diverse alike in point of race, of language, and of institutions without destroying their individuality.

633. **The Processes of Confederate Growth.** — In its briefest terms the story is this. The Cantons broke from the toils of the

feudal system while still in possession of those local liberties which the disintegrateness of that system gave leave to grow wherever courageous men could muster numbers enough to assert their independence; having a common cause against the feudal powers about them, they slowly drew together to each other's support; and, having allied themselves, they went on to show the world how Germans, Frenchmen, and Italians, if only they respect each the other's liberties as they would have their own respected, may by mutual helpfulness and forbearance build up a union at once stable and free. Several centuries elapsed before the development was complete, for the Confederation, as finally made up, consisted of two very different elements: of strong and for the most part aristocratic free cities and of quiet rural peasant democracies. It was necessarily a long time before even common dangers and common interests brought proud Cantons like Bern and aristocratic cities like Geneva into cordial relations with Schwyz, Uri, and Unterwalden, the humble originators of the Confederacy. But circumstances constrained and wisdom prevailed: so that union was at last achieved.

634. **French Interference.** — The year 1513 may be taken as marking the close of the period during which the Confederacy won the place it was always to keep among the powers of Europe. In that year the League was joined by the last of those thirteen German Cantons which were to constitute its central membership down to the French Revolution. It was not till 1848, however, that its constitution was put upon its present foundations; and not till 1874 that that constitution received at all points its present shape. In the meantime events of the greatest magnitude gave direction to Swiss affairs. The great powers had recognized the independence of Switzerland in the Treaty of Westphalia, 1648. The thirteen original Cantons had received great French cities, like Geneva, to the west, and various Italian lands, to the south, either into close alliance or into fixed subjection. The French Revolution had sent French troops into Switzerland, in support of a fruitless attempt to manufacture out of the always stiffly independent Cantons, hitherto only confederates, a compact and centralized 'Helvetic Republic,' after the new model just set up in unhappy France (1798–1802). Napoleon had inter-

vened (1803–1814) for the purpose of both loosing these artificial bonds and creating a new cement for the League in the shape of a common allegiance to himself. And, in 1815, the pressure of the French power being removed, reaction had come. The irritated Cantons, exasperated by the forms of a government not of their own choosing, had flung apart, to the practice of principles of cantonal sovereignty broader, extremer even than those upon which they had based their Union before 1798. And then reaction, in its turn, brought its own penalties. Troubles ensued which read very much like those, so familiar to Americans, which forced a strong federal government upon the United States.

635. **The Sonderbund War.** — It was, however, differences of religious, not of political, opinion which were in Switzerland the occasion of the strife which was to bring union out of disunion. After the power of Napoleon had been broken, the Congress of Vienna had sought to readjust all the arrangements that he had disturbed, and Swiss affairs had not been overlooked. The Cantons were induced to receive Geneva, Valais, Neuchâtel, and the territories hitherto held as dependencies, into full confederate membership, and to agree to a Pact (known as the Pact of 1815) which gave to the League, with its increased membership of twenty-two Cantons, a new basis of union. One of the clauses of that Pact contained a solemn guarantee of the rights and privileges of the monasteries still maintained in the Roman Catholic Cantons: and upon that guarantee were based the hopes of all parties for peace among the members of the League. But the guarantee was broken down. The wave of democratic reform swept steadily and resistlessly through Switzerland during the revolutionary period of 1830–1848, and where the Protestant and Roman Catholic parties were nearly equal in popular force threatened not a few of the oldest foundations of the mediæval church. The crisis was first felt in Zürich, where the excesses of a radical party temporarily in control brought about, in 1839, a violent reaction. The next year saw the disturbance transferred to Aargau. There the anti-Catholic party, commanding, during a period of constitutional revision, a narrow popular majority, and exasperated by the violent opposition tactics of the clerical party,

forced a vote in favor of the abolition of the eight monasteries of the Canton. The Diet of the Confederation was thereupon asked by the aggrieved party whether it would permit so flagrant a breach of the Pact of 1815. It was forced by a conflict of interests to a compromise, agreeing to the abolition of four of Aargau's eight monasteries. This was in August, 1843. The next month saw the formation of a separate League (*Sonderbund*) by the seven Roman Catholic Cantons, Schwyz, Uri, Unterwalden, Luzern, Freiburg, Valais, and Zug. The deputies of these Cantons were, however, slow in withdrawing from the Diet, and the Diet was reluctant to come to open strife with its recalcitrant members. Four years this league within a league was permitted to continue its obstructive agitation. But at last, in November, 1847, war came, — a sharp, decisive contest of only eighteen days' duration, in which the seceded Cantons were overwhelmed and forced back to their allegiance.

636. **The New Constitution.** — Constitutional revision followed immediately. The Pact of 1815 was worn out: a strong and progressive constitution had become a necessity which not even the party of reaction could resist or gainsay. By the Constitution of 1848 there was created, out of the old discordant Confederation of States (*Staatenbund*) the present federal State (*Bundesstaat*). That Constitution, as modified and extended by the important revision of 1874, is the present Constitution of Switzerland.

637. **Character of the Constitution.** — The federal government thus established has many features which are like, as well as many which are very unlike, the familiar features of our own national system. It has had, since 1874, a federal Supreme Court, which is in many important fields of jurisdiction the highest tribunal of the land; and it has had since 1848 a Legislature consisting of two branches, or Houses, the one representative of the people, the other representative of the states of the Confederation. The popular chamber is called the 'National Council' (*der Nationalrath*), the federal senate, the 'Council of States' (*der Ständerath*). The former represents the people as a whole; the latter, the States as constituent members of the Confederation.

638. Much of the resemblance of these arrangements to our own is due to conscious imitation. The object of the reformers of 1848 and 1874 was not, however, to Americanize their government, and in most respects it remains distinctively Swiss.

639. **Nationality and State Sovereignty.** — Much as such institutions resemble our own federal forms, the Constitution of Switzerland rests upon federal foundations such as our own government had during the first half century of its existence rather than upon national conceptions such as have dominated us since the war between the States. The Swiss Constitution does indeed expressly speak of the Swiss nation, declaring that "the Swiss Confederacy has adopted the following Constitution with a view to establishing the union (*Bund*) of the Confederates and to maintaining and furthering the unity, the power, and the honor of the Swiss nation": and not even the war between the States put the word *nation* into our Constitution. But the Constitution of Switzerland also contains a distinct and emphatic assertion of that principle of divided sovereignty which is so much less familiar to us now than it was before 1861. It speaks of the Confederation as formed by "the people of the twenty-two sovereign Cantons," and it explicitly declares that "the Cantons are sovereign, so far as their sovereignty is not limited by the federal Constitution, and exercise as such all rights which are not conferred upon the federal power"; and its most competent interpreters are constrained to say that such a constitution does not erect a single and compacted state of which the Cantons are only administrative divisions, but a federal state, the units of whose membership are themselves states, possessed, within certain limits, of independent and supreme power. The drift both of Switzerland's past history and present purpose is unquestionably towards complete nationality; but her present Constitution was a compromise between the advocates and the opponents of nationalization; and it does not yet embody a truly national organization or power.

640. **Large Constitutional Grants.** — At the same time, the grants of power under the Swiss Constitution have from the first been both larger and less definite than those contained in the Constitution of the United States. It contains such indefinite

grants as these: that the federal legislature shall have power to pass "laws and resolutions concerning those subjects which the Confederacy is commissioned by the federal Constitution to act upon"; to control the foreign relations of the Cantons; to guarantee the constitutions and territories of the Cantons; to provide for the internal safety, order, and peace of the country; to adopt any measures "which have the administration of the federal Constitution, the guaranteeing of the cantonal constitutions, or the fulfilment of federal duties for their object"; and to effect revisions of the federal Constitution.

641. It adds to such federal powers as we are familiar with the authority to regulate religious bodies and monastic orders, to control the manufacture and sale of alcoholic liquors, to establish general sanitary regulations in the case of certain diseases, to control the construction and operation of all railroads, to regulate labor in factories, to provide for the compulsory insurance of workmen, and to legislate throughout the whole field of commercial law. The federal government is given, besides, a large power of superintendence. It has supervision of streams and forests, and of the more important roads and bridges; it has the right to disapprove of and annul the press laws of the several cantons, and their regulations with regard to the acquisition of residence and the franchise in the communes; and it exercises in many another matter a general oversight and guardianship.

642. **Guarantee of the Cantonal Constitutions.** — The Swiss federal Constitution is more definite in guaranteeing to the Cantons their constitutions than our federal Constitution is in guaranteeing to the States "a republican form of government." The guarantee is made to include the freedom of the people and their legal and constitutional rights; the exercise of those rights under representative or democratic forms; and the revision of any cantonal constitution whenever an absolute majority of the citizens of the Canton desire a revision.

This 'guarantee' is not used or understood in Switzerland as it is in the United States. Here the sanction and support of the federal government is taken for granted, unless the constitutional arrangements of a State are challenged as unrepublican. In Switzerland it is expected that each Canton shall seek the explicit sanction or guarantee of the federal government for its constitution, and even for each amendment as added.

Down to here for Friday

The Cantonal Governments.

643. **The Cantonal Constitutions and the Federal Constitution.** — So deeply is Swiss federal organization rooted in cantonal precedents, that an understanding of the government of the Confederation is best gained by studying first the political institutions of the Cantons. At almost all points the federal government exhibits likeness to the governments of the Cantons, out of whose union it has grown. As our own federal Constitution may be said to generalize and apply colonial habit and experience, so the Swiss Constitution may be said to generalize and apply cantonal habit and experience: though both our own Constitution and that of Switzerland have profited largely by foreign example also.

644. In some respects the Swiss Constitution is more conservative — or, if you will, less advanced — than the Constitution of the United States. Those who have fought for union in Switzerland have had even greater obstacles to overcome than have stood in the way of the advocates of a strong central government in this country. Differences of race, of language, and of religion, as well as stiffly opposing political purposes, have offered a persistent resistance to the strengthening and even the logical development of the prerogatives of the federal power. The Constitution of the Confederation, therefore, bears many marks of compromise. It gives evidence at certain points of incomplete nationalization not only, but even of imperfect federalization. Cantonal institutions are, consequently, upon a double ground entitled to be first considered in a study of the governments of Switzerland. Both their self-assertive vitality and their direct influence upon federal organization make them the central subject of Swiss politics.

645. **Position of the Legislative Power.** — The development of political institutions has proceeded in the Swiss Cantons rather according to the logic of practical democracy than according to the logic of the schools. The Swiss have not, for one thing, hesitated to ignore in practice all dogmas concerning the separation of legislative, executive, and judicial functions. I say 'in practice'; for in theory such distinctions are observed. The

constitutions of fully half the Cantons say explicitly that legislative, executive, and judicial functions shall be kept fundamentally distinct; but in the practical arrangements actually made the line of demarcation is by no means sharply drawn. The leading principle according to which they proceed in all political arrangements is, that in every department of affairs the people must, either immediately or through representatives, exercise a direct, positive, effective control. They do not hesitate, therefore, to give to their legislative bodies a share both in the administration and in the interpretation of laws; and these bodies are unquestionably the axes of cantonal politics.

646. **A Single House.** — A very great variety of practice marks the organization of government in the Cantons. Each Canton has had its own separate history and has, to a certain extent, worked out its own individual political methods. But there is one point of perfect uniformity, — the Legislature of each Canton consists of but a single House. The two Houses of the federal legislature have been made after foreign, not after Swiss, models. In Uri, Unterwalden, Glarus, and Appenzell this single lawmaking body is the *Landsgemeinde*, the free assembly of all the qualified voters, the *folk-moot;* but in the other Cantons the legislative assembly is representative. Representatives are elected by direct popular vote in all the Cantons, and in almost all by the secret ballot.

647. Elections are for a term which varies from one year to six in the different Cantons, the rule being a term of from three to four years. The number of representatives bears a proportion to the number of inhabitants which also varies as between Canton and Canton, the average being about one to every 994 inhabitants.[1]

648. In most of the Cantons the legislative body is called the Great Council (*Grosse Rath*) — the executive body being the Lesser Council. In some it is called the Cantonal Council (*Kantonsrath*) ; in others, the *Landrath*.

649. **Functions of the Cantonal Legislatures.** — The functions of these councils have the inclusiveness characteristic of Swiss political organization. Not only are they entrusted with such

[1] Orelli, *Das Staatsrecht der schweizerischen Eidgenossenschaft* (Marquardsen's *Handbuch*), pp. 100, 101.

legislative power as the people are willing to grant; they also, as a rule, select many of the administrative officers of the Canton, and exercise, after such election, a scrutiny of administrative affairs which penetrates to details and keeps executive action largely within their control. It is a recognized principle of cantonal government, indeed, that the executive body — executive power, as we shall see, being vested in a board or commission, not in an individual — is a committee of the representatives of the people, — a committee of the legislative Council.[1] To that council they are responsible, as the selectmen of a New-England town are responsible to the town-meeting (secs. 1218, 1219).

650. **The Executive Power** is collegiate in all the Cantons, is exercised, that is, not by a single individual or by several individuals acting independently of each other, but by a commission. This commission is variously called in the different Cantons. In some it is known as the "*Landammann* and Council," in others as the "Estates-Commission" (*Standeskommission*), in some as the "Smaller Council"; but in most as the "Administrative Council" (*Regierungsrath*). Its term of office varies in the different Cantons with the term of the legislative body, with which it is always coincident; but the custom is reëlection, so that the brief tenure does not in practice result in too frequent changes in executive *personnel*. The members of the executive have always in the mountain Cantons been chosen by the people themselves; in the others they were formerly elected always by the legislative council — whence the name, "smaller council," which they bear in some Cantons. Now, however, direct election by the people has been substituted in eleven Cantons, and only eight retain the practice of election by the Great Council. Whether elected by the people or by the Great Council, however, the Administrative Council remains, in function, a committee of the legislative body. Its members freely take part in the business of legislation and in the debates of the Great Council. It in fact originates most of the measures of each session, and is looked to for guidance in every matter of consequence. It does not resign if outvoted upon its proposals. It is, on the contrary, regarded in most of the Cantons rather as a business head than as a body of party leaders,

[1] Orelli, p. 99.

and its membership is usually made up, not from one, but from the several political parties of the Canton.

651. The Administrative Council usually consists of from five to seven members, though in the Canton of Berne it contains nine. It has proved necessary of late years to give over the attempt to act in all matters as a Board, and it has become usual to divide the work of the Council among departments. But these departments are under the general direction of the Council as a whole, and the administration of a canton has usually a very real coherence and an intimate coördination.

652. **The People's Control over Legislative Action.** — Although the people have delegated their legislative powers to representative chambers in all the Cantons except those which still retain their primitive *Landsgemeinden*, they have nevertheless kept in their own hands more than the mere right to elect representatives. The largest of the Cantons (Berne) has but a little more than half a million inhabitants; the majority of the Cantons have less than one hundred thousand apiece; and the average population, taking big and little Cantons together, is only about one hundred and twenty thousand. Their average area scarcely reaches six hundred and forty square miles. The people of such communities stand, as it were, in the midst of affairs. They are in a sense always at hand to judge of the conduct of the public business. Their feelings and their interests are homogeneous, and there is the less necessity to part with their powers to representatives. In seven of the German Cantons a certain number of citizens (the number varies from one to twelve thousand) can demand a popular vote upon the question whether the Great Council shall be dissolved or not; and if the vote goes in the affirmative the chamber's term is ended and a new election takes place at once. If this method of control is no longer used, it is because more effective methods have been substituted. In almost all the Cantons the question of constitutional revision can be brought to popular vote upon petition, and the revision, if undertaken, may go any length in changing or reversing the processes of legislation.

653. **The Popular Veto.** — In some of the smaller Cantons, again, the people are given a right of Veto. It is provided that, within a certain length of time after the publication of a measure

passed by the Council (generally about a month), a popular vote upon the measure may be forced by the petition of some fifty citizens (the number varies of course in different Cantons) and the measure be made to stand or fall according to the decision of that vote. The law is rejected, however, only when an actual majority of all the registered voters cast their ballots against it. Those who do not vote are reckoned as favorable to the law.

654. **The Initiative: Imperative Petition.** — So far has the apparent logic of democracy been carried in Switzerland that the people exercise in several ways a direct part in lawmaking. The right of petition, which is recognized in every country where popular rights exist at all, has become in Switzerland a right of initiative in legislation. In every Canton except Geneva the people have been granted the right to initiate constitutional reforms by petition; and in all except Luzern, Freiburg, and Valais the same right has been established with regard to the revision or enactment of ordinary laws. In the Confederation petitions signed by fifty thousand voters have, since 1891, been imperative in respect of the introduction of constitutional amendments. In the case of ordinary legislation, specific laws may be proposed by petition, in all the Cantons except the three I have named; the legislature must submit the law proposed to the popular vote; and its adoption at the polls puts it upon the statute book. In the case of constitutional amendments, it is generally provided that either general or specific changes may be proposed: that is, that the changes may be proposed either in general terms or in definitive and final form, ready for adoption. If the proposal is couched only in general terms, the legislature may either formulate the desired amendment at once and submit it to the people, or, if it disapprove of the change proposed, it may first submit the general question to the vote of the electors. If, in the latter event, the vote be in the affirmative, the legislature must proceed to formulate the necessary article or articles and these must be submitted in their definitive shape once more to the popular verdict. If the petition itself embody a specific change already drawn and formulated, the amendment must go in that shape to the vote, and its adoption makes it part of the fundamental law. The number of signatures required for these im-

perative petitions varies with the size of the Cantons, a very usual number being from five to six thousand. Petitions demanding a change in the fundamental law of the Confederation must be signed, as we have seen, by not less than fifty thousand voters.

655. The Initiative has been very little used, having given place in practice, for the most part, to the *Referendum*. Where it has been employed it has not promised either progress or enlightenment, leading rather to doubtful experiments and to reactionary displays of prejudice than to really useful legislation. In both of the great Cantons of Zürich and Berne, the most populous and influential in the Confederation, it has been used to abolish compulsory vaccination. It was established for the Confederation only six years ago (1891), and has been used in federal legislation only to aim a blow at the Jews, under the disguise of a law forbidding the slaughtering of animals by bleeding.

656. **The Referendum.** — Both Veto and Initiative in practice yield precedence to the *Referendum*. In every Canton of the Confederation, except Freiburg only, the right of the people to have all important legislation referred to them for confirmation or rejection has now been, in one form or another, established by law. In the smaller Cantons, which have had, time out of mind, the directest forms of democracy, this legislation by the people is no new thing; they have always had their *Landsgemeinden*, their assemblies of the whole people, and the legislative function of their Councils has long been only the duty of preparing laws for the consideration of the people. Among the Cantons which have representative institutions, on the other hand, the *Referendum* assumes a different form. In about one-half of them laws must be submitted to the vote of the electors only when their submission is demanded by petition, with the requisite number of signatures. This is called the 'optional' or 'facultative' *Referendum*. In the rest of the Cantons (always excepting Catholic and conservative Freiburg) substantially all substantive changes in the laws must be submitted to the electors, and the action of their legislatures is periodically voted upon. This is known as the 'obligatory' *Referendum*. The Federation itself has had the optional *Referendum* since 1874. The *Referendum* is, moreover, everywhere obligatory, whether in the Confederation or in the

several Cantons, in the case of every constitutional change. Administration and the ordinary budget are usually excepted from its operation, and it is made to apply, within the field of ordinary legislation, only to laws of a general character; but in most of the Cantons it is made to cover also all appropriations of an unusual character or above a certain sum; and in Valais it applies only to certain financial measures.

657. **Origin of the Referendum.** — The term *Referendum* is as old as the sixteenth century, and contains a reminiscence of the strictly federal beginnings of government in two of the present Cantons of the Confederation, Graubünden, namely, and Valais. These Cantons were not at that time members of the Confederation, but merely districts allied with it (*zugewandte Orte*). Within themselves they constituted very loose confederacies of Communes (in Graubünden three, in Valais twelve). The delegates whom the Communes sent to the federal assembly of the district had to report every question of importance to their constituents and crave instruction as to how they should vote upon it. This was the original *Referendum*. It had a partial counterpart in the Constitution of the Confederation down to the formation of the present forms of government in 1848. Before that date the members of the central council of the Confederation acted always under instructions from their respective Cantons, and upon questions not covered by their instructions, as well as upon all matters of unusual importance, it was their duty to seek special direction from their home governments. They were said to be commissioned *ad audiendum et referendum*. The *Referendum* as now adopted by almost all the Cantons bears the radically changed character of legislation by the people. Only its name now gives testimony as to its origin.[1]

658. **Its Operation.** — In respect of constitutional changes the use of the *Referendum* is not peculiar to Switzerland. In that field its use in this country is older than its use in Switzerland. And in its application to ordinary laws it is modern even in Switzerland. Its earliest adoption was in 1852, and it was not until the decade 1864–1874 that it won its way into the constitutional practice of the greater Cantons. Its use, therefore, is everywhere new, and the experience by which we must judge of it is recent and partial. It is still tested only in part. It has led in most cases to the rejection of radical legislation, even to the rejection of radical labor legislation, such as the ordinary voter might be expected to accept with avidity. The Swiss populations, being both homogeneous and deeply conservative, have resisted, as perhaps no other people have, the infection of modern radical opinion. They have shown themselves

[1] Orelli, p. 104.

apt to reject, also, complicated measures which they do not fully comprehend, and measures involving expense which seems to them unnecessary. And yet they have shown themselves not a little indifferent, too. The vote upon most measures submitted to the ballot is usually very light; there is not much popular discussion; and the *Referendum* by no means creates that quick interest in affairs which its originators had hoped to see it excite. It has dulled the sense of responsibility among legislators without in fact quickening the people to the exercise of any real control in affairs.

659. **Local Government: the Districts.** — Local government in the Cantons exhibits a twofold division, into Districts and Communes. The District is an area of state administration, the Commune an area of local self-government. The executive functions of the District, the superintendency of police, namely, and the carrying into effect of the cantonal laws, are entrusted, as a rule, not to a board, but to a single officer, — a *Bezirksammann* or *Regierungs-Statthalter*, — who is either elected by popular vote in the District or appointed by one of the central cantonal councils, the legislative or the administrative. Associated with this officer, there is in some Cantons a District or county Council chosen by vote of the people.

660. **The Gemeinde,** or Commune, enjoys in Switzerland a degree of freedom in self-direction which is possessed by similar local organs of government hardly anywhere else in Europe. It owns land as a separate corporation, has charge of the police of its area, of the relief of its poor, and of the administration of its schools, and acts in the direction of communal affairs through a primary assembly of all its freemen which strongly reminds one of the New-England town-meeting (sec. 1218). Besides its activities as an organ of self-government in the direction of strictly local affairs, the Commune serves also as an organ of cantonal administration, as a subdivision of the District. Thus it is an electoral district, and a voting district in the case of a *Referendum;* and in so far as it is used as a district of the Canton it is subject to the supervision of the local authorities of the state.

661. There is by no means a fixed and uniform organization in the local government of the Cantons. In the Communes of

the French Cantons, for example, the people do not themselves act directly in affairs, in township meeting, as the people of the German Cantons do, but through an elected council, and the organization of local business suggests the cantonal organization upon a small scale. In all the Communes alike, however, as in the Cantons, the executive power is vested in a board of officials, presided over by a *Hauptmann*, a *Gemeindeamman*, a *Syndic*, or a *Maire*. This communal or municipal council is chosen, in the German Cantons, by the freemen in assembly, in the French Cantons by the representative body to which supervision in affairs and the enactment of all local regulations is entrusted. The *Hauptmann* has often separate powers of his own, apart from and independent of his colleagues; but in most matters he is merely the presiding officer of the administrative council, and executive action is collegiate.

662. **Citizenship** in Switzerland is associated very closely with the Commune, — the immediate home-government of the citizen, — the primary and most vital organ of his self-direction in public affairs. The Commune is, so to say, the central political family in Switzerland; it is to it that the primary duties of the citizen are owed. Naturalization is regulated by federal law; but the full rights of citizenship can be conferred only by cantonal and communal law.

The Federal Government.

663. **The Federal Executive.** — In no feature of the federal organization is the influence of cantonal example more evident than in the collegiate character of the Executive. The executive power of the Confederation, like the executive power of each Canton, is vested not in a single person, as under monarchical or presidential government, but in a board of persons. Nor does Swiss jealousy of a too concentrated executive authority satisfy itself with thus putting that authority 'into commission': it also limits it by giving to the legislative branch of the government, both in the Cantons and in the federal system, an authority of correction as regards executive acts such as no other country has known. The share of the legislative branch in administrative affairs is smaller, indeed, under the Federal Constitution than

under the laws of the Cantons; but it is large even in the federal system, and it seems inherent in Swiss political thought.

664. The executive commission of the Confederation is known as the Federal Council (*Bundesrath*). It consists of seven members elected for a term of three years by the two houses of the federal legislature acting together in joint session as a Federal Assembly (*Bundesversammlung*). The Constitution forbids the choice of two of its seven members from one and the same Canton: they must represent seven of the twenty-two Cantons. The Council is organized under a President and Vice-President chosen by the Federal Assembly, from among the seven councillors, to serve for a term of one year, the Constitution insisting upon the extreme democratic doctrine of rotation. Neither President nor Vice-President can fill the same office for two consecutive terms; nor can the President be immediately nominated to the office of Vice-President again upon the expiration of his term. There is nothing to prevent the Vice-President succeeding the President, however; and it has hitherto been the uniform practice to follow this natural and proper line of promotion.

665. The Federal Assembly may elect to the Council any Swiss citizen who is eligible to either Chamber of the Legislature. As a matter of fact, however, they almost invariably make their choice from amongst the members of the Chambers, though an election to a place in the executive body necessitates a resignation of the legislative function. Berne and Zürich have always been represented in the *Bundesrath*, and are considered to have acquired a sort of prescriptive right to places on it. Vaud has almost always had a member, too; and Aargau was represented continuously till 1891.

666. The choice of the Federal Assembly in constituting the executive has hitherto been admirably conservative. Some of the more prominent members of the Council have been retained upon it by repeated reëlection for fifteen or sixteen years; one has served for thirty years; and those who have left its membership have generally done so of their own accord. Only twice, indeed, since 1848, have members who wished reëlection been refused it.[1]

667. The Federal Assembly fills all vacancies in the membership of the Council, electing, however, only for the unexpired term.

668. The three-years term of the Council is coincident with the three-years term of the National Council, the popular branch of the Legislature.

[1] *Westminster Review*, Vol. 129, p. 207.

At the beginning of each triennial term of this lower House, the two Houses come together as a Federal Assembly and elect (in practice re-elect) the Federal Council. If the National Council be dissolved before the close of its three-years term, the election of the *Bundesrath* must be renewed by the two Houses upon the assembling of the new National Council. The *Bundesrath* is thus not, strictly speaking, elected for three years, but for the term of the National Council, whatever that may turn out to be.

669. The precedence of the President of the Council is a merely formal precedence: he is in no sense the Chief Executive. He represents the Council in receiving the representatives of foreign powers; he enjoys a somewhat enhanced dignity, being addressed in diplomatic intercourse as 'His Excellency'; and he receives a little larger salary than his colleagues receive; but he is in all practical matters merely the Council's chairman.

670. **The Executive and the Legislature.** — The members of the Federal Council, though they may not be at the same time members of either House of the Legislature, may attend the sessions of either House, may freely take part in debate, and may introduce proposals concerning subjects under consideration: may exercise most of the privileges of membership, except the right to vote. They are expected, indeed, to prepare and guide the business of the Houses, and every bill is submitted to them for an opinion before its passage. They thus to a certain extent occupy a position resembling that which a French or English ministry occupy; but there is this all-important difference: the English or French ministers are subject to 'parliamentary responsibility,' — must resign, that is, whenever any important measure which they favor is defeated; whereas the Swiss ministers are subject to no such responsibility. Defeat in the Legislature does not at all affect their tenure. They hold office for a term of years, not for a term of legislative success; and they are the servants of the Houses, not their leaders. They have habitually been chosen from both the chief parties in the Confederation, and since 1891 a third political group has been represented among them. They are not expected to speak the same opinions even on the floor of the Houses. But they are expected to act in harmony in all business, and to mediate between extreme views in matters of deliberation.

671. There have been two cases since the establishment of the Council, in 1848, — two cases, that is, in fifty years, — of resignation from the Council on the ground of disagreement in political opinion, — but two only.[1]

672. **The Executive Departments.** — The Council acts as a body of Ministers. It was the purpose of the Constitution that all executive business should be handled by the Council as a whole, but of course such collegiate action has proved practically impossible: it has been necessary to divide the work among seven Departments. Each member of the Council presides over a Department, conducting it much as an ordinary minister would under a Cabinet system, though there is a somewhat closer union of the several Departments than characterizes other systems, and a greater degree of control by the several ministers over such details of administration as the 'permanent' subordinates of Cabinet ministers generally manage, by virtue of possession, to keep in their own hands, to the restraint and government of transient political chiefs. All important decisions emanate from the Council as a whole; and, so far as is practicable, the collegiate action contemplated by the Constitution is adopted.

673. The seven Departments, as organized by a law taking effect January 1, 1888, are (1) of Foreign Affairs, (2) of Justice and Police, (3) of the Interior, (4) of War, (5) of Finance and Imposts, (6) of Industry and Agriculture, and (7) of Posts and Railways. The department of Foreign Affairs is now separated from the presidency, with which it was formerly always associated, so that greater continuity of policy is now possible in all departments.[2] The arrangement of administrative business in Departments is effected in Switzerland, as in France and Germany, by executive decree, and not by legislative enactment, as in the United States.

674. It is considered the capital defect of this collegiate organization of the Swiss executive, combined as it is with the somewhat antagonistic arrangement of a division of executive business among Departments, that it compels the members of the Council to exercise at one and the same time two largely inconsistent functions. They are real, not simply nominal, heads of Departments, and are obliged as such to give their time and attention to the routine, the detail, and the technical niceties of administration; and yet as a body they are expected to impart to the administration as a whole that uniformity, breadth, and flexibility of policy that can

[1] *Westminster Review*, Vol. 129, p. 207.

[2] See Hiltz, *Politisches Jahrbuch der Schweiz*, 1887, p. 778.

be imparted only by those who stand aloof from detail and routine and command the wider views of general expediency. They are called to be both technical officials and political guides. It has been suggested by thoughtful Swiss publicists that it would be vastly better to give the Departments permanent heads and leave to a board of ministers such as the present Council only a general oversight. Political and administrative functions require different aptitudes, must be approached from very different points of view, and ought seldom to be united in the same persons.[1]

675. **Mixed Functions of the Executive.** — Swiss law, as I have said, makes no very careful distinction between executive, legislative, and judicial functions. Popular jealousy of executive power has resulted, alike in the cantonal systems and in the system of the Confederation, in the vesting of many executive functions either wholly or in part in the lawmaking bodies, and a very singular confusion between executive and judicial functions has resulted in the possession by both the executive and the legislative bodies of prerogatives which should, on any strict classification, belong only to regularly constituted courts of law. It is, consequently, somewhat difficult to get a clear summary view of the rôle played in Swiss federal affairs by the central executive Council. Its duties give it a touch both of legislative and of judicial quality.

676. (1) It stands closely connected with the Legislature because of its part in shaping legislation. The Council both originates proposals in the Houses and gives its opinion upon proposals referred to it, either by the Houses or by the Cantons. It renders annual reports to the Houses concerning its conduct of administration and the condition of the Confederation, which give it opportunity to urge upon them necessary measures of reform or amelioration; and which, being freely debated, give the members of the Houses, also, an opportunity to press their own criticisms and suggestions with reference to the conduct of the administration. It presents the budget of the Confederation also to the Houses and leads in its debates of financial legislation. It is, in brief, the intimate servant and in part the authoritative guide of the Legislature, both taking and giving advice. The Houses may

[1] Orelli, *Das Staatsrecht der schweizerischen Eidgenossenschaft* (Marquardsen's, *Handbuch*), p. 36.

reverse whatever action of the Executive they please, even though it be merely administrative in character; but they usually suggest, they do not often condemn action already taken.

677. (2) In the exercise of several of its most important duties the action of the Council is essentially judicial. It is empowered to examine the agreements made by Cantons among themselves or with foreign governments and to judge of their conformity with federal constitutional law, withholding its approval at its discretion. In like manner there are other cantonal laws and ordinances whose validity is made dependent upon its approval; and to a very limited extent, a jurisdiction like that entrusted to the Federal Court in hearing complaints concerning breaches of federal law is given it. It has also authoritative oversight of the administration of federal law by the cantonal officials. There are not many federal officials; federal law is for the most part executed by local officers, the Federal Council supervising.

678. Here are some of the topics touching which the authoritative opinion of the Council may be taken: cantonal school affairs; freedom of trade and commerce, and the interpretation of contracts with foreign states which concern trade and customs-levies, patent rights, rights of settlement, freedom from military service, free passage, etc.; rights of settlement within the Cantons; freedom of belief; validity of cantonal elections, votes, etc.; gratuitous equipment of the militia.[1]

679. (3) Its strictly executive functions are, however, its most prominent and important functions. It appoints all officers whose selection is not otherwise specially provided for by law; it of course directs the whole executive action of the government, controlling federal finance, and caring for all federal interests; equally of course, it manages the foreign affairs of the Confederation. Besides these usual executive and administrative functions, it exercises, however, others less common. It is the instrument of the Constitution in making good to the Cantons the federal guarantee of their constitutions. It executes the judgments of the Federal Court, and also all agreements or decisions of arbitrators concerning matters in dispute between Cantons.[2] In cases of necessity it may call out and itself direct the movements of such cantonal troops as are needed to meet any sudden

[1] Orelli, pp. 43, 44.

[2] *Ibid.*, p. 34.

danger, provided the Legislature is not in session to command such measures, and provided the call is for not more than two thousand men or for a service of more than three weeks. If more men or longer service seem necessary, the Legislature must be called at once and its sanction obtained. This power of the Council to call out troops to meet a pressing peril of war or riotous disorder is a logical part of the general duty which is imposed upon it of guarding both the external and the internal safety and order of the Confederation, a duty which embraces the general police function of keeping the peace.

680. **The Army.** — The Confederation can maintain no standing army; only the Cantons can maintain troops in time of peace; and even they cannot keep more than three hundred men apiece without the consent of the Confederation.

681. **Detail of Federal Supervision.** — The federal government is directed by the Constitution to see to it that the Cantons provide free, compulsory, non-sectarian education for their people, and that the political rights and liberties of individuals are respected by cantonal law. It is likewise authorized, in case of internal disturbances, to intervene to preserve the public order upon its own initiative, whenever the cantonal authorities are unable to call upon it for assistance. It has been held, moreover, that it may exercise many of these extensive powers of oversight and direction upon the initiative of individuals whose rights are affected, as well as upon the initiative of the cantonal governments themselves; and its powers of superintendence and intervention have shown a marked tendency to grow from generation to generation. The people have come to feel the Cantons in many things too small to do without the aid and countenance of the federal power.

682. **Execution of Federal Law.** — Although the supervisory powers of the federal government are very great, however, its active administrative duties are not many. The federal laws are for the most part executed by cantonal officials, under the superintendence of the Federal Council. In all that concerns foreign affairs the federal government acts for itself and through its own officials; it directly administers the custom house, too, and the postal and telegraph systems of the country. It has charge of its own arsenals; and it is entrusted with the management of the government alcohol monopoly and of the national polytechnic school. But in almost all other matters it is served by cantonal officials. Even the Federal Court has no executive officers of its own. (Comp. secs. 531, 538, 539.)

683. **Appeal in Judicial Cases.** — Following the example of the cantonal constitutions, which provide for a very absolute depend-

ence of the executive upon the representatives of the people and freely neglect, in practice, the careful differentiation of legislative from administrative functions, the Federal Constitution of 1848 allowed an appeal in all cases from the Federal Council to the Federal Assembly (*Bundesversammlung*). The constitutional revision of 1874, which had as one of its chief objects the development and strengthening of the judiciary of the Confederation, transferred many appeals to a Federal Court, but it left the action of the Federal Council no less subject to the Assembly than before, and it did not exclude the Legislature from judicial functions. It was, indeed, provided that the Federal Court, rather than the Assembly, should in most cases hear appeals from the Federal Council; but it was also arranged that certain 'administrative' cases might be reserved to the Assembly by special legislative action. Religious and 'confessional' questions have, accordingly, been retained by the Legislature — questions which would seem to be as far as possible removed from the character of administrative matters.

684. It seems to have been the conscious purpose of the more advanced reformers in 1874 to bring the Federal Court as near as possible in character and functions to the Supreme Court of the United States; but they were able to realize their purpose only in part. The most important prerogative of our own Court, its powers, namely, of constitutional interpretation, was denied the Federal Court in Switzerland. Most constitutional questions are decided by the Legislature, except when specially delegated to the Court by legislation. The chief questions of this nature now taken cognizance of by the Court are disputes as to constitutional rights between cantonal and federal authorities.

685. **The Federal Chancellor.** — The office of Federal Chancellor is worth nothing as an inheritance of the present from the older Confederation, in whose days of incomplete federalization the Chancellor typified the unity of the Cantons. The Chancellor is elected by the Federal Assembly at the same time and for the same term (three years) as the Federal Council. He is chief clerk of both Houses of the Federal Assembly, is keeper of all the federal records, and exercises a semi-executive function as preserver of diplomatic forms and usages. A Vice-Chancellor acts under the Chancellor as Secretary of the Council of States (*Ständerath*), the Chancellor acting chiefly for the popular chamber.

686. **The Federal Legislature.** — Properly speaking, the legislative powers of the Confederation are vested in the Federal

Assembly (*Bundesvesammlung*); but that Assembly consists of two distinct Houses, the National Council (*Nationalrath*) and the Council of States (*Ständerath*); and the Houses act separately in all strictly legislative matters, coming together as a single Assembly only for the exercise of certain electoral and judicial functions. The two Houses stand in all respects upon an equal footing: there is no difference of function between them. The originative work of each session — that is, the first handling of measures — is divided between them by a conference of their Presidents at the beginning of the session. The Constitution requires that at least one session be held annually: as a matter of practice there are usually two sessions of about four weeks each every year, one beginning in June, the other in December, and a shorter extra session in March. Special sessions may be called either by resolution of the Federal Council or upon the demand of five Cantons or of one-fourth of the members of the National Council. An absolute majority of its members constitutes a *quorum* in each House.

687. **Composition of the Houses: I. The National Council.** — The popular chamber of the Assembly consists of one hundred and forty-seven members chosen from fifty-two federal electoral districts (*Wahl-Kreise*) in the proportion of one representative for every 20,000 inhabitants. The federal electoral districts cannot, however, cross cantonal boundary lines and include territory in more than one Canton. If, therefore, in the apportionment of representatives among the Cantons, the division of the number of inhabitants of any Canton by the number 20,000 shows a balance of 10,000, or more, that balance counts as 20,000, and entitles to an additional representative. Reapportionments are made from time to time to meet changes in the number of inhabitants as shown by decennial censuses. If any Canton have less than 20,000 inhabitants, it is, nevertheless, entitled to a representative.

688. This is the case with the three so-called half-cantons, Obwalden, Nidwalden, and Inner Appenzell, and the ancient canton of Uri. Zug, which has but 23,167, also returns but a single member. Berne, on the other hand, which has 541,051 inhabitants, has twenty-seven representatives, and Zürich, with 351,917, seventeen; while one other, Vaud, has twelve, and two, St. Gallen and Aargau, have, respectively, eleven and ten.

689. In those electoral districts which send more than one representative — as, for instance, in Berne, whose twenty-seven members are sent from six districts — candidates are voted for upon a general ticket, each voter being entitled to vote for as many representatives as the district returns. It requires an absolute majority to elect.

690. Every Swiss twenty years of age who is not a clergyman and who is qualified to vote by the law of his Canton may vote for members of the National Council. The term of the National Council is three years. Elections take place always in October, on the same day throughout the country, — and that day is always a Sunday.

691. It is upon the assembling of each new National Council that the election of the Federal Council takes place (secs. 665–669). The three-years term of the executive Council is thus made to extend from the beginning of the first session of one National Council to the beginning of the first session of the next.

692. The National Council elects its own officers; but in selecting its President and Vice-President it is bound by a rule similar to that which limits the yearly choice of a President of the Confederation. The President or Vice-President of one session cannot be reëlected for the session next following. For the officers of the National Assembly, like the officers of most European law-making bodies, are elected every session instead of for the whole term of the body, as in our House of Representatives and the English House of Commons.

693. **II. The Council of States** (*Ständerath*) is composed of forty-four members: two from each of the twenty-two Cantons. It would thus seem to resemble very closely in its composition our own federal Senate and to represent distinctively the federal feature of the union between the Cantons. In fact, however, it has no such clearly defined character: for the mode in which its members shall be elected, the qualifications which they shall possess, the length of time which they shall serve, the salary which they shall receive, and the relations they shall bear to those whom they represent, in brief, every element of their character as representatives, is left to the determination of the Cantons themselves, and the greatest variety of provisions consequently prevails. From some Cantons the members are sent for one year only; by some for three; by others for four; by still others for two. In the Cantons which have the obligatory *Refer-*

endum they are generally elected by popular vote, as the members of the National Council are; in those which have representative institutions they are usually elected by the legislative body of the Canton. Differing, thus, from the National Council, as regards at least very many of its members, only in the fact that every Canton sends the same number as each of the others and chooses the term for which they shall be elected, the Council of States can hardly be called the federal chamber: neither is it merely a second chamber. Its position is anomalous and obviously transitional.

694. The Council of States elects its own President and Vice-President, but subject to the restriction that neither President nor Vice-President can be chosen at any session from the Canton from which the President for the immediately preceding session was taken, and that the office of Vice-President cannot be filled during two successive regular sessions by a member from the same Canton.

695. The Cantons, upon enumeration, number, not twenty-two, but twenty-five, because three of them have been divided into 'half-cantons,' namely, Unterwalden, Basel, and Appenzell. The half-cantons send each one member to the Council of States. The following is a list of the Cantons: Zürich, Berne, Luzern, Uri, Schwyz, Obwalden, Nidwalden, Glarus, Zug, Freiburg, Solothurn, Baselstadt, Baselland, Schauffhausen, Outer Appenzell, Inner Appenzell, St. Gallen, Graubünden, Aargau, Thurgau, Ticino, Vaud, Valais, Neuchâtel, Geneva.

696. **Functions of the Houses.** — It may be said, in general terms, that its Legislature is the supreme, the directing organ of the Confederation. It is difficult, therefore, to classify the functions which the Houses exercise, because they extend into every field of government; but the following may serve as a distinct arrangement of them: 1. They exercise the sovereignty of the Confederation in its dealings with foreign states, controlling all alliances or treaties with foreign powers, determining questions of peace and war, passing all enactments concerning the federal army, and taking the necessary measures for maintaining the neutrality and external safety of Switzerland. 2. They maintain the authority of the Confederation as against the Cantons, taking care to pass all the measures necessary for preserving internal safety and order and for fulfilling the federal guarantee of the cantonal constitutions, and deciding, upon appeal from the Fed-

eral Council, the validity of agreements between the Cantons or between a Canton and a foreign power. 3. They exercise the general legislative powers of the Confederation, providing for the carrying out of the Federal Constitution and for the fulfilment of all federal obligations. 4. They pass upon the federal budget and control the federal finances. 5. They organize the federal service, providing for the creation of all necessary departments or offices and for the appointment and pay of all federal officers. 6. They oversee federal administrative and judicial action, hearing and acting upon complaints against the decisions of the Federal Council in contested administrative cases. 7. With the concurrence of the people, they revise the Federal Constitution.

697. **Legislative Procedure.**— Each House is served in the conduct of its business by a President, a Vice-President, and four Tellers. These six officers constitute a 'Bureau,' whose duty it is not only to count the votes upon a division, but also to look after absentees, and to appoint such committees as the chambers do not themselves choose to elect. Much of the business introduced is referred to committees for detailed consideration; but the Federal Council is the grand committee. All important legislation either comes from it or goes to it for final formulation, and its part is generally a guiding part in debate.

698. **Revision of the Constitution.** — When the two Houses can agree concerning a revision of the Constitution, it is effected by the ordinary processes and under the ordinary rules of legislation, though it is followed by an obligatory *Referendum* to the people. But a revision may also be otherwise accomplished. If one House demands particular changes and the other House refuses to assent, or if 50,000 qualified voters call for a revision by petition, the question whether or not a revision shall be undertaken must be submitted to popular vote; and if there be a majority of the whole of such popular vote in the affirmative, new Houses must be elected and the revision proceeded with. In every case the amendments adopted by the Houses must be voted upon by the people and must be accepted by a majority of the people and by a majority of the Cantons also in order to go into force. In reckoning up the votes by Cantons, on such occasions, the vote of a half-canton counts as half a vote.

699. **The Federal Referendum.** — "Federal laws, as well as generally binding federal resolutions, which are not of a pressing nature, shall be laid before the people for their acceptance or rejection upon the demand of 30,000 qualified Swiss citizens or of eight cantons." Such is the command of Article 89 of the Federal Constitution which establishes for the Confederation the 'facultative' or 'optional' *Referendum* (sec. 656).

700. The whole detail of the exercise of the *Referendum* is regulated by federal legislation. A period of ninety days, running from the date of the publication of the law, is set within which the demand for a popular vote must be made. Copies of all federal laws which are subject to *Referendum* are sent to the authorities of each Canton, and by them published in the Communes. For the Communes are constituted the districts in which the popular demand is to be made up. That demand must be made by written petition addressed to the Federal Council; all signatures must be autographic; and the chief officer of the Commune must attest the right of each signer to vote. Demands from Cantons for the *Referendum* are made through the cantonal councils, subject to the right of the people, under the provisions of the cantonal *Referendum*, to reverse the action. In case it appears that 30,000 voters or eight Cantons demand *Referendum*, the Federal Council must set a day for the popular vote; a day which must be at least four weeks later than the resolution which appoints it.

701. **Functions of the Federal Assembly.** — The functions which the Houses exercise in joint session, as the Federal Assembly, are not legislative but electoral and judicial. 1. The Assembly elects the Federal Council, the federal judges, the Chancellor, and the generals of the confederate army. 2. It exercises the right of pardon. 3. It determines conflicts of jurisdiction between federal authorities, fulfilling the functions delegated under the French and Prussian constitutions to a special Court of Conflicts (secs. 475, 629).

702. The President of the National Council presides over the sessions of the Federal Assembly, and the rules of the National Council for the most part govern its proceedings.

703. **Administration of Justice: I. The Cantonal Courts.** — The Cantons are left quite free by the Federal Constitution to organize their courts as they please. Not even a general uniformity of system is prescribed as in Germany (sec. 556); nor

are the cantonal courts subordinated to the Federal Court except in certain special cases provided for by statute. It may be said, in general terms, that justice is administered by the Cantons, with recourse in selected cases to the tribunal of the Confederation.

704. There is, however, a certain amount of uniformity in judicial organization throughout Switzerland. There are usually two ranks of courts in each Canton: District Courts (*Bezirksgerichte* or *Amtsgerichte*) which are courts of first instance, and a supreme Cantonal Court (*Kantonsgericht*) which is the court of final instance. There are also everywhere Justices of the Peace whose duty it is, in many places, first to act as mediators in legal disputes, — and as magistrates only when they fail as mediators. Petty police cases are heard by the District Courts; but for the hearing of criminal cases there is trial by jury under the presidency of a section of the supreme court justices, or by a special criminal court acting without a jury.

705. In three of the larger Cantons, Geneva, Zürich, and St. Gallen, there are special Cassation Courts put above the *Obergericht*. Zürich and Geneva have also special Commercial Courts (*Handelsgerichte*).

706. In many of the Cantons the Supreme Court exercises certain semi-executive functions, taking the place of a Ministry of Justice, in overseeing the action of the lower courts and of all judicial officers, such as the states-attorneys.

707. In most of the cantons, too, the Supreme Court makes annual reports to the legislative Council, containing a full review of the judicial business of each year, discussing the state of justice, with criticisms upon the system in vogue and suggestions of reform. These reports are important sources of judicial statistics.

708. The terms of cantonal judges vary. The usual terms are three, four, and six years. The judges of the inferior courts are as a rule elected directly by the people: those of the supreme courts commonly by the legislative Council.

709. In Berne the legislative Council also elects the Presidents of the District Courts; but this is not the usual practice.

710. No qualifications for election to the bench are required by Swiss law except only the right to vote. But here, as well as in regard to the very brief terms of the judges, practice is more conservative than the law. To the higher courts, at least, competent lawyers are generally elected; and reëlection is in most cases the rule.

711. In Geneva the States-attorney, instead of the Supreme Court, is given the general duties of superintendence which, outside of Switzerland, are vested in a Minister of Justice; and in other Cantons similar officers are given prerogatives much more extensive than are usually associated with such offices elsewhere.

712. **II. The Federal Court.** — The Federal Court was created by the Constitution of 1848. Before that time arbitration had been the only form of adjudication between the Cantons. Even in creating it, however, the Constitution of 1848 withheld from the Federal Court all real efficiency: its jurisdiction was of the most restricted kind and was condemned to be exercised under the active superintendence of the omnipotent Federal Assembly. It was one of the chief services of the constitutional reform of 1874 that it elevated the Federal Court to a place of substantial influence and real dignity. It still rests with the Houses to determine by statute many of the particular questions which shall be submitted to the Court; but its general province, as well as its organization, is prescribed in considerable detail by the Constitution. Doubtless the Federal Court, like the Council of States, is still in a transitional stage, and will ultimately be given a still more independent and influential position.

713. The Federal Court consists of nine judges chosen by the Federal Assembly (with due regard to the representation of the three official languages of Switzerland, — German, French, and Italian) for a term of six years. Every two years, also, the Federal Assembly selects two of these nine to act, the one as President, the other as Vice-President, of the Court. The Court sits, not at Berne, the legislative capital of the Confederation, but at Lausanne.

714. The Federal Assembly elects, at the same time that it chooses the judges, nine substitutes also, who sit, as occasion demands, in place of any judge who cannot act, and who receive for their occasional services a *per diem* compensation.

715. The members of the Court may not hold any other office or follow any other business during their term as judges; nor can they be members of any business corporation.

716. Seven judges constitute a *quorum* of the Court. The number of judges who sit in any case must always be an uneven number, including the president.

717. **Criminal Jurisdiction of the Federal Court.** — In the exercise of its criminal jurisdiction the Federal Court goes on circuit. The country is divided into five assize districts (*Assisenbezirke*), one of which embraces French Switzerland; a second, Berne, and the surrounding Cantons; a third, Zürich and the Cantons bordering upon it; a fourth, central, and part of east Switzerland; and the fifth, Italian Switzerland.

718. The Court annually divides itself, for criminal business, into three bodies: A Criminal Chamber, a Chamber of Complaints, and a Chamber of Appeals. The Criminal Chamber decides at what places in the several Districts assizes shall be held. The places selected furnish, at their own cost, a place of meeting. The cantonal police and court officers serve as officers of this Court. A States-attorney appears for the Federal Council in all cases.

719. **Cases in Public Law.** — The jurisdiction of the Federal Court covers a great variety of causes. There are (1) Cases in Public Law. These include disputes between Cantons concerning such matters as the fulfilment of inter-cantonal agreements, the settlement of boundary lines, conflicts of jurisdiction between the authorities of different Cantons, and extradition; also the enforcement of agreements between Cantons and foreign governments; and, most fertile of all, cases involving the constitutional rights of citizens, whether those rights rest upon the federal or upon a cantonal constitution. Its jurisdiction does not, however, cover questions as to the constitutionality of federal legislation. The federal Houses are the sole judges, under public opinion, of their own powers.

720. It is considered "the proper and natural province of the Federal Court" in Switzerland "to defend the people and the citizens against abuses of power, whether they proceed from federal or cantonal authorities." Such a province is, however, in the very nature of the case, insusceptible of definite limitations; and the powers of the Federal Court have gradually spread far abroad by reason of the temptations of this vague prerogative. The most usual and proper cases arising under it are infringements of the federal guarantee to citizens of equality before the law, of freedom of settlement, of security against double taxation, of liberty of the press, etc., but the Court has gone much beyond these. Its jurisdiction has been extended to the hearing of complaints against cantonal authorities for ordinary alleged failures of justice, such as the Consti-

tution can hardly have contemplated giving into the hands of the Federal Court. The Court has even "brought within the circle of its judgments cases where the appellant asserts a denial of his claims by a cantonal judge grounded upon merely obstructive motives or an arbitrary application of the law." [1]

721. The Federal Court has also cognizance of contested citizenship cases between Communes of different Cantons. For citizenship in Switzerland is first of all of the Commune. The Commune is, so to say, the unit of citizenship, and it is through communal citizenship that cantonal citizenship is held (sec. 662).

722. (2) **Civil Cases in Private Law.** — The administration of justice between individuals under federal laws is left for the most part to the cantonal courts, which thus serve in a sense as federal tribunals; but if, in any case falling under federal law, a sum of 3000 francs be involved, or if the matter involved be not susceptible of money valuation, an appeal may be taken to the Federal Court from the court of last resort in the Canton. Certain other private law cases, even when they do not involve federal law, may be brought, — not by appeal, but in the first instance, — before the Federal Court upon another principle, because, *i.e.*, of the nature of the parties to the suit, *viz.*: Cases between Cantons and private individuals or corporations; cases in which the confederation is defendant; cases between Cantons; and cases between the Confederation and one or more Cantons (sec. 1306).

723. Cases of the first two of these four classes can be brought in the Federal Court only if they involve a sum of 3000 francs. Otherwise they must be instituted and adjudged in the cantonal Courts.

724. By agreement of both parties, the jurisdiction of the Federal Court may be invoked in any case in which the subject of litigation is rendered important by virtue of federal legislation.

725. A special railroad jurisdiction, too, has been given by statute to the Federal Court, covering cases concerning right of way and the right of eminent domain, and cases in private law between railroads and the Confederation.

726. (3) **Criminal Cases.** — The criminal jurisdiction of the Federal Court covers cases of high treason and of outbreak or

[1] Orelli, p. 42.

violence against the federal authorities, breaches of international law, and political offences which were the cause or the result of disorders which have necessitated the intervention of the Confederation. It may, however, in the discretion of certain authorities, include a variety of other matters in addition to these. Federal officers, whose breaches of duty are ordinarily punished upon judgment of the cantonal tribunals, may, by resolution of the Federal Council or of the Federal Assembly, be handed over to the Federal Court to be judged. Cases may even, also, be assigned to the federal tribunal by cantonal constitutions or laws, if the Federal Assembly assent to the arrangement.

The Chamber of Appeals of the Federal Court takes cognizance, besides, of complaints concerning judgments of the cantonal courts given under certain fiscal, police, and banking laws of the Confederation.

727. **The Federal Council**: (4) **Administrative Cases.** — The administrative jurisdiction of the Confederation, which is exercised, not by the Federal Court, but by the Federal Council, includes a great number of important cases. It covers questions touching the calling out of the cantonal militia, the administration of the public-school system of the Cantons, freedom of trade, occupation and settlement, consumption taxes and import duties, freedom of belief and worship, the validity of cantonal elections and votes, and rights arising out of contracts with foreign powers regarding trade relations, the credit to be given to patents, exemption from military service, freedom of passage, etc. In all these cases an appeal lies from the Federal Council either to the Houses or to the Federal Court.

728. **Inter-Cantonal Judicial Comity.** — The Swiss Constitution, in close imitation of the provision on the same subject in the Constitution of the United States, requires that full force and credit be given the judgments of the courts of each Canton throughout the Confederation.

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IX.

THE DUAL MONARCHIES: AUSTRIA-HUNGARY — SWEDEN-NORWAY.

729. **The Dual Monarchies.** — Midway in character between unitary kingdoms like France and England and federal states like Germany and Switzerland stand the dual monarchies of Austria-Hungary and Sweden-Norway. Each of these dual governments consists of two kingdoms united under a single monarch, and under neither is there any extensive fusion of the political institutions of the two countries thus united. Each of the united kingdoms, under the one government as under the other, keeps its own institutions, and therefore to a large extent its own individuality: but at the summit of their governments a single throne unites them, and in some things a common machinery of administration. Very interesting and important differences of law and organization, however, separate Austria-Hungary from its northern analogue, Sweden-Norway.

Austria-Hungary.

730. **Austria's Historical Position.** — Until the middle of the present century Austria stood at the front of German political union; not until 1866 was she deposed from leadership in Germany and set apart to attempt alone the difficult task of amalgamating the polyglot dual monarchy of Austria-Hungary (sec. 492).

731. **Acquisition of Hungary and Bohemia.** — It was unquestionably Austria's headship in the Empire which enabled the Habsburg princes at once to broaden and to consolidate their domain in the southeastern border-land between Slav and Teuton. Their power and influence within the Empire gave them their

opportunity to control the destiny of border states like Bohemia and Hungary, lying at Austria's doors. Both Hungary and Bohemia fell to Habsburg in the same year, the year 1526, when Ferdinand I. mounted their throne.

732. **Bohemia.** — Bohemia was a Slavonic wedge thrust into the side of Germany. Compassed about by hostile powers, it was a prize to be fought for. Alternately conquered by several neighboring kingdoms, it finally fell into German hands and became an apanage of the Empire. It was as such that the Habsburgers seized it when its throne became vacant in consequence of the extinction of a Luxemburg line of princes. In 1526 their hold upon it became complete, and they were thenceforth able to keep it secure as an hereditary possession within their family.

733. **Moravia.** — Moravia also was and is Slavonic. Slavs early drove out its Teutonic possessors, and were prevented from joining the Slavs of the southeast in the formation of a vast Slavonic kingdom only by the intervention of the Magyars, the conquerors of Hungary. This dominant race in the tenth century thrust themselves in between the Slavs of the northwest and those of the southeast, and, driving back the Slavs of Moravia, reduced the once 'Great Moravia' to the dimensions of the present province. Striven for by Hungary, by Poland, and by Bohemia, Moravia finally met her natural fate in incorporation with Slavonic Bohemia (1029), and passed, along with that kingdom, into Austrian hands, in 1526.

734. **Hungary.** — Hungary is the land of the Magyars, a Turanian race which retains even to the present day its distinctive Oriental features, habits, and bearing among the native European races about it. After having suffered the common fortune of being overrun by numerous barbaric hordes at the breaking up of the Roman Empire, the territory of Hungary became, in 889, the realm of the Magyar duke Árpád, the Conqueror. In the year 1000 the duke Vaik, who had succeeded to the duchy in 997, received at the hands of Pope Sylvester II. the title of 'apostolic king' of Hungary, and, under the name of Stephen, became the first of a line of native monarchs which kept the throne until 1301. From 1301 till 1526 kings of various families and origins won places upon the throne. During this period, too, Hungary felt the full power of the Turk, since 1453 master of Constanti-

nople. The battle of Mohács (29 August, 1526) brought terrible overthrow upon the Hungarian forces at the hands of Soliman the Magnificent, and death to Louis, the Hungarian king. Louis was childless; his widow, Maria, was sister to Ferdinand I. of Austria; and it was her influence which led the more powerful party of nobles within the kingdom to elect the Habsburger to the throne and so put Austria permanently in the Hungarian saddle. Not, however, until 1665–1671, a period of insurrection in Hungary, did the Habsburgers convert their elective into an hereditary right to the throne.

735. **Transylvania, Slavonia, Croatia.** — Transylvania, Slavonia, and Croatia, annexed at various times to Hungary, passed with Hungary to the house of Habsburg. Except during the period 1848 to 1867, the period during which Hungary was being disciplined for her revolt of 1848–1849, these provinces have remained apanages of Hungary, though Croatia occupies a somewhat distinctive position, and is always accorded a representative of her own in the Hungarian ministry. From 1848 to 1867 Transylvania, Slavonia, and Croatia were treated as Austrian crown lands.

736. **Galicia, Dalmatia.** — Galicia, a district much fought for and often divided, but for some time attached to Poland, came to Austria upon the first partition of Poland, in 1772. Dalmatia, once part of ancient Illyria, afterwards a possession of Venice, much coveted and sometimes held by Croatia and by Hungary, was acquired by Austria through the treaty of Campo Formio, in 1797.

737. **Bosnia and Herzegovina.** — The Congress of Berlin, 1878, which met to fix upon a basis for the new settlements resulting from the victories of Russia over Turkey, added to Austria's multifarious duties as ruler of many races the protectorate of Bosnia and Herzegovina, districts inhabited by a Servian race and long subject to Turkish dominion.

738. **Austria-Hungary: Nature of the Union.** — The present constitution of the Austro-Hungarian monarchy practically recognizes but two parties to the union, Austria and Hungary. Bohemia, for all she has so much individuality and boasts so fine a history of independence, is swallowed up in Austria: only the Magyars of Hungary, among all the races of the heterogeneous realm of the Habsburgers, have obtained for the kingdom of their making a standing of equality alongside of dominant Austria.

739. **Variety of Race.** — The commanding difficulty of government throughout the whole course of Austro-Hungarian politics

has been the variety of races embraced within the domain of the monarchy. First and most prominent is the three-sided contrast between German, Slav, and Magyar. Within this general classification, again, Slav differs from Slav by reason of many sharp divergencies of history, of speech, and of religion; and outside this classification, there is added a miscellany of Italians, Croats, Serbs, Roumanians, Jews, — men of almost every race and people of eastern Europe. This variety is emphasized by the fact that only the Czechs (Bohemians), among all these peoples, have a separate home land in which they are in the majority. In Bohemia and Moravia the Czechs constitute considerably more than half the population; whilst in Hungary the Magyars, though greatly outnumbering any other one element of the population, are less than half the whole number of inhabitants; and in Austria, though men of German blood are very greatly in the majority in the central provinces which may be called Austria proper, they constitute in Austria taken as a whole very little more than one-third of the population.

740. **Home Rule: Bohemia, Hungary.** — At least two among these many races, moreover, are strenuously, restlessly, persistently devoted to independence. No lapse of time, no defeat of hopes, seems sufficient to reconcile the Czechs of Bohemia to incorporation with Austria. Pride of race and the memories of a notable and distinguished history keep them always at odds with the Germans within their gates and with the government set over their heads. They desire at least the same degree of autonomy that has been granted to Hungary.

741. Not 'granted' either. No doubt it would be more correct to say the degree of autonomy *won* by Hungary. Dominant in a larger country than Bohemia, perhaps politically more capable than any Slavonic people, and certainly more enduring and definite in their purposes, the Magyars, though crushed by superior force in the field of battle, have been able to win a specially recognized and highly favored place in the dual monarchy. Although for a long time a land in which the noble was the only citizen, Hungary has been a land of political liberties almost as long as England herself has been. The nobles of Hungary won from their king, Andreas II., in 1222, a "Golden Bull" which was a

veritable Magna Charta. It limited military service in the king's army, it regulated taxation, it secured for every noble trial by his peers, it gave order and propriety to judicial administration, it even enacted the right of armed resistance to tyranny. The nobles, too, established their right to be personally summoned to the national Reichstag. Standing upon these privileges, they were long able to defeat even the absolutism of the Austrian monarchs. Ferdinand I. acquired the throne of Hungary only after recognizing her constitution; not for more than a hundred years did the crown become hereditary in the Austrian house; and not till 1687 did the ancient right of armed resistance lose its legal support.

742. The period of reaction which followed the Napoleonic wars and the Congress of Vienna found kings everywhere tightening where they could the bonds of absolutism: and nowhere were those bonds more successfully strengthened than in Austria-Hungary under the reigning influence of the sinister Metternich. 1848, however, saw the flames of insurrection break forth more fiercely in Hungary than anywhere else in terror-stricken Europe: only by the aid of Russia was Austria able once more to get control of her great dependency. So completely was Hungary prostrated after this her supreme effort that she had for a little no choice but to suffer herself to be degraded into a mere province of Austria.

743. **The Constitution of 1867.** — Wars and disasters presently burst upon the absolutist Austria, however, in an overwhelming storm. Thrust out from Germany (sec. 492), she was made at length to feel the necessity, if she would give her realm strength, to give her subjects liberty. Her eyes were at last fully opened to the supreme folly of keeping the peoples under her rule weak and spiritless, poor and motionless, in order that her monarchs might not suffer contradiction. She assented, accordingly, 18 February, 1867, to a constitutional arrangement which recognized the kingdom, not as Austria's, but as the joint kingdom of Austria-Hungary, and which gave to the Empire its present relatively liberal political organization.

744. **Dual Character of the Monarchy.** — The Austro-Hungarian monarchy, although compacted by the persistent forces of

a long historical development, is not a unitary state, a territorial and legal unit, but simply a "real union of two constitutionally and administratively independent states." This union is, indeed, more substantial than that between Sweden and Norway: the latter has existed less than seventy-five years, and is, as we shall see (secs. 769, 803), only an arrangement by which two kingdoms may subsist under a single king, as partners in international undertakings but as something less than partners in affairs of nearer interest; while Austria-Hungary, on the contrary, held as a dual possession by a single royal house for more than three hundred and fifty years, subjected by that house to the same military and financial services, and left the while in possession of only such liberties as could be retained by dint of turbulent insistence, consists of two countries at many points interlaced and amalgamated in history and in institutional life.

745. **The Fundamental Laws.** — The present constitutional law of the dual kingdom rests upon grants of privilege from the Crown. It is divisible into three parts: the laws of the union, the laws of Austria, and the laws of Hungary. (a) The laws of the union embrace, beside various other rules concerning succession to the throne, the Pragmatic Sanction of 1713, which was formally adopted by the representatives of the Hungarian group of states; and the identical Austrian and Hungarian laws, passed in December, 1867, which fix the relations of the two kingdoms to one another and arrange for the administration of their common affairs. (b) The fundamental law of Austria consists of various royal decrees, 'diplomas,' and patents, determining the membership, privileges, etc., of the national Reichsrath and of the provincial *Landtags*. Of these the chief are five fundamental laws of December, 1867, by which a general reconstruction of the government was effected, in agreement with the new constitution given to the union in that year. (c) The constitutional arrangements of Hungary rest upon the Golden Bull of Andreas II., 1222, touching the privileges of the Estates (sec. 741); upon certain laws of 1790–1791 concerning the political independence of Hungary, and her exercise of legislative and executive powers; upon laws of 1847–1848 granting ministerial responsibility, annual sessions of the Reichstag, etc.; and upon a law of 1868 (amended

in 1873) whereby Croatia-Slavonia is given certain distinct privileges to be enjoyed independently of Hungary. These are most of them older laws than the Austrian. Although able for long periods together to keep Austria at their feet, the Habsburgers have never been able to keep Hungary for long in a similar attitude of submission. Her constitutional separateness and independence, though often temporarily denied in practice, have never been destroyed. The coöperative rights of the Estates in government, communal self-administration, and the privileges of the free cities have triumphantly persisted spite of all efforts made to suppress them.

746. **The Common Government: the Emperor-King.** — The Emperor of Austria bears also the titles King of Bohemia and 'Apostolic' King of Hungary (sec. 734). He stands at the head, not of one of the branches of the government, but of the whole government in all its branches. In theory, indeed, he alone governs: he makes, while legislatures and provincial assemblies only assent to, the laws. Law limits his powers: the sphere of his authority is fixed in each kingdom by definite constitutional provisions; but, whatever practical concessions modern movements of thought and of revolution may have compelled, it yet remains the theory, and to a certain extent the fact, of constitutional development in Austria-Hungary that the monarch has himself of his own free will created such limitations upon his prerogative as exist. There is, therefore, significantly enough, nothing to be said by constitutional commentators in Austria-Hungary either concerning the king's veto or concerning any special arrangements for constitutional change. It is thought to go without the saying that the monarch's negative will absolutely kill, his 'let it be' abundantly vitalize, all laws, whether constitutional or other.

747. Of course limitations upon the monarch's prerogative are not necessarily any the less real because he *may* abrogate them if he dare, so long as the whole disposition and temper of his people and of his times forbid his abrogating them.

748. **Succession, Regency, etc.** — The laws touching the succession to the Austro-Hungarian throne provide so minutely for the widest possible collateral inheritances, that provision for a vacancy is apparently not necessary. Permanent laws vest the regency in specific representatives of the royal house. The royal age of majority is sixteen years.

749. **The Common Ministries.** — The Emperor-King is assisted in his direction of the common affairs of his two kingdoms by three Ministries and an Imperial Court of Audit. There is (1) a *Ministry of Foreign Affairs* and of the Imperial Household, which, besides the international functions indicated by its name, is charged with oversight of the foreign trade and shipping interests of the dual kingdom. (2) *The Ministry of War*, by which the common standing army of the two kingdoms is administered. The legislation upon which the maintenance of this common standing army is based originates with the legislatures of the two kingdoms acting separately. It is, that is, matter of agreement between the two countries. It covers such points as the size of the army, liability to military service, rules and methods of recruiting, etc., and is embodied in identical laws adopted by the two legislatures, each acting for itself and without constitutional compulsion.

750. As commander-in-chief of the army, the Emperor-King has the full right of discipline, full power to appoint, remove, or transfer officers of the line, and the determination of both the war and peace organizations of the army, quite independently of any action whatever on the part of the minister of war. In most other concerns of the military administration, however, his acts require the countersignature of the minister.

The militia, or reserve, services of the two kingdoms are separate, and separately maintained; but in war the militia of both countries becomes supplementary to the regular army.

(3) *The Ministry of Finance:* acting under the Emperor, the minister of finance prepares the joint budget, apportions the costs of the common administration between Austria and Hungary, sees to the raising of the relative quotas, applies the common income in accordance with the provisions of the budget, and administers the common floating debt. The Ministry of Finance is in addition charged with the administration of Bosnia and Herzegovina.

751. These two countries, although still nominally parts of the Turkish Empire, have really, since the Treaty of Berlin (1878), been subject in all things to Austria (see 737). The Austrian Ministry of Finance stands for them in the position of all administrative departments in one.

752. The chief sources of the common revenue in Austria-Hungary are customs duties and direct contributions from the treasuries of the two states. Certain parts of the customs duties are assigned to the common

treasury; and such expenses as these are not sufficient to meet are defrayed by the contributions, Austria paying sixty-eight, and Hungary thirty-two, per cent. of the sums needed.

753. **The Economic Relations of Austria and Hungary** are regulated in the important matters of commerce, the money system, the management of those railroads and telegraph lines whose operation affects the interests of both kingdoms, the customs system, and the indirect taxation of industries by formal agreements of a semi-international character entered into every ten years, and brought into force by separate but of course identical laws passed in the national legislatures of both countries. Each state controls for itself the collection of customs duties within its own territory; but Austria-Hungary is regarded as forming only a single customs and trade territory, and the laws touching administration in these fields must be identical in the two countries.

There is a joint stock Austro-Hungarian bank at Vienna; the two kingdoms have by treaty the same system of weights and measures; and there is separate coining but the same coinage.

754. **Patents, Posts, and Telegraphs.** — A common system of patents and copyrights is maintained; and both countries have the same postal and telegraph service.

755. **The Delegations.** — The most singular, interesting, and characteristic feature of the common government of Austria-Hungary is the Delegations, which constitute, in germ at least, a common Legislature. There are two Delegations, an Austrian and a Hungarian. They are respectively committees of the Austrian and Hungarian legislatures. Each Delegation consists of sixty members, twenty of whom are chosen by the upper, forty by the lower chamber of the legislature which they represent. But, although thus in form a committee of the legislature which sends it forth, each Delegation may be said to represent the kingdom from which it comes rather than the legislature of that kingdom. It is not subject to be instructed, but acts upon its own judgment as an independent body. The two Delegations sit and act separately, though they exercise identical functions. Each passes judgment upon the budget of the common administration, each is at liberty to take action upon the management of the common debt, each superintends the common administration, and can freely question and 'interpellate' (sec. 428) the ministers, from whom each hears periodical reports; and each has the privilege of initiative as regards all measures coming within

their competence. These functions are concurrent, not joint. They are, nevertheless, obviously functions which must under such a system be exercised in full agreement: the common administration cannot serve two masters. If, therefore, after a triple exchange of resolutions no agreement has been reached between the two bodies, a joint session is held, in which, without debate, and by a mere absolute majority vote, the question at issue is decided.

756. As a matter of fact the legislative powers of the Delegations are very narrow indeed. Their independent action is confined for the most part to the granting of supplies and the superintendence of the administrative action of the three common ministries. The very supplies they grant come out of taxes voted separately by the parliaments of the two kingdoms; and almost every agency they use rests upon treaties and identical laws independently passed.

757. The term for which the Delegations are elected is one year. They are called together by the monarch annually, one year at Vienna, the next at Buda-Pest.

758. In the selection of members of the Delegations the Austrian crown lands (the provinces once separate or independent) are entitled to representation, as is also favored Croatia-Slavonia on the Hungarian side.

759. When the two Delegations meet in joint session, the number of members present from each must be equal to the number of those present from the other, any numerical inequality being corrected by lot.

760. **Citizenship.** — There is no common citizenship for the two kingdoms; but in all business relationships the citizens of each state are regarded as citizens of the other.

761. **The Government of Austria: the Executive.** — The governing power rests in Austria with the Emperor. The Emperors of the present day may by no means venture upon the centralization of authority attempted and in part effected by Maria Theresa and Joseph II.; but Austrian constitutional law does not assign duties to the head of the state: it assigns functions to the ministers and grants privileges to the representative bodies. All powers not explicitly so conferred remain with the Emperor. He directs all the administrative activities of the state; he appoints the life members of the upper house of the *Reichsrath;* and, through his ministers, he in large measure controls legislation. But he must act in administration through the ministers and in

legislation through the parliament. The countersignatures of the ministers have been, by statute, made necessary for the validity of his decrees; and the consent of the *Reichsrath* is indispensable to the determination of the policy and content of all legislation. The only judicial prerogative that remains with him is the power of pardon. On all sides his power is circumscribed by the legally necessary coöperation of other regularly constituted authorities.

762. **The Ministry,** which consists of a Minister-President and seven heads of departments, acts as the Emperor's council, but it does not constitute a board whose majority vote decides administrative questions. Action is taken, rather, in each department upon the individual responsibility of the minister at its head. The ministers have a threefold office: they are the Emperor's councillors, they execute his commands, and they are the responsible administrators of special branches of the public service. They act for the Emperor also in introducing measures in the *Reichsrath*. They must attend both Houses to defend the policy of the executive and to answer 'interpellations.'

763. There are eight executive departments: Interior, National Defence, Religion and Education, Trade, Agriculture, Finance, Justice, and Railways. The Minister-President often holds no portfolio, and constitutes a ninth minister.

764. **Legislation: the National and Provincial Legislatures.** — In all legislation of whatever kind the coöperation of the representatives of the people is necessary; but not all of this coöperative privilege belongs to the *Reichsrath*, the national legislative body. Coöperation in the greater matters of legislation is expressly given by law to the *Reichsrath*, but all legislative powers not expressly granted to it belong to the sphere of the *Landtags* of the seventeen provinces (kingdoms, grand-duchies, archduchies, duchies, and counties), of which the conglomerate realm is made up.

765. **The Reichsrath.** — The *Reichsrath* consists of a House of Lords (*Herrenhaus*) and a House of Representatives (*Abgeordnetenhaus*). To the House of Lords come princes of the blood royal who have reached their majority, the archbishops and cer-

tain bishops, nobles of high rank who have acquired hereditary seats in the chamber, and such life members as the Emperor chooses to appoint in recognition of special services to the state, to the church, to science, or to art. To the other House come representatives chosen by five classes of voters: the great landowners, the cities and marts, chambers of trade and commerce, the rural communes, and a fifth general class which "includes substantially all men not in domestic service."[1] The term of the lower house is six years.

766. The present number of members in the House of Representatives is four hundred and twenty-five. Representation is apportioned among the several lands which form the Austrian domain; and in Dalmatia the greater taxpayers, instead of the greater landowners, are represented. In the class of landowners women and corporations may vote. The franchise — which is partly direct, partly indirect — is made to rest throughout all the classes of voters, except the fifth, in one way or another either upon property or taxation.

767. The assent of the chambers is required not only in legislation but also for the validity of treaties which affect the trade of the country, which lay economic burdens upon the state, which affect its legal constitution, or which concern an alienation or extension of territory. The powers of the two Houses are the same, except that financial measures and bills which affect recruitment for the army must originate in the House of Representatives.

768. It is the general rule that the assent of both Houses is necessary to every resolution or action of the *Reichsrath;* but an interesting exception is to be noted. If a disagreement arise between the chambers upon a question of finance or of military recruitment, the lowest figures or numbers are to be considered adopted.

769. The Emperor names not only the life members but also the president and vice-president of the House of Lords. He calls and opens the sessions of the *Reichsrath,* and may close, adjourn, or dissolve it.

770. It is within the prerogative of the Emperor, acting with the advice of his ministers, to enact any laws which may seem to be immediately necessary during a recess of the *Reichsrath*, provided they be not financial

[1] Lowell, *Governments and Parties in Continental Europe*, II., 88.

laws, or laws which in any way permanently encumber the state. But such laws must be submitted to the *Reichsrath* within four weeks after its next assembling (going first to the House of Representatives), and altogether lapse unless submitted to the *Reichsrath* within that time, and sanctioned by it. (Compare secs. 796–798.)

771. **Ministerial Responsibility.** — In theory, the ministers are responsible to the Houses, and must resign if defeated; but the theory finds no realization in practice. Race lines determine party lines in the Houses, and even members of the same race do not keep steadily together in purpose or policy; so that there are no governing parties, and no majorities that can be reckoned beforehand. The Emperor may placate now this group, and again the other, and so keeps his own ministers and pursues his own policy as he can.

772. **The Landtags.** — The greater political divisions of Austria retain their own *Landtags*, or local legislatures, and to these belong considerable legislative powers. The Emperor names the chairmen of the *Landtags* and their substitutes; he calls, opens, and may close, adjourn, or dissolve the *Landtags;* and his assent is necessary to all their acts. But their consent is necessary to almost all laws which affect the provinces which they represent, and their privileges constitute an important part of the total of legislative power which rests with the representatives of the people. The provinces have also extensive rights of self-administration.

773. **Local Government.** — The *Landtags* are of course the most conspicuous organs of self-government. Each *Landtag* consists of a single chamber and represents the same classes of voters that send members to the national *Reichsrath* (sec. 765), — with the addition of another, an official class. The administrative organ of the province is a provincial committee, as in France (sec. 453). The central government is represented in the exercise of its many local powers by a *Statthalter* or *Landes präsident*, whose powers are very extensive. Within the province there are, in some parts of the country, districts or circles, which are areas of financial administration; and throughout the country the smallest areas of local government are the Communes, local bodies which, acting within the commission of general statutes, exercise considerable powers of self-direction through a communal committee and a communal president chosen, together with a certain number of assistants, by the committee.

774. The Communes are organs of the provinces, and their presidents to a certain extent serve the general state administration.

775. **The Government of Hungary: the Executive.** — The king bears substantially the same relations to the other powers of the state in Hungary that he bears in Austria. The directing head of the state, he yet must act in all administrative matters through the ministers, and in all legislative matters through the national chamber. Even his treaty-making power is limited as regards Hungary in the same way that it is limited as regards Austria (sec. 767).

776. The Hungarian Ministry consists of a Minister-President and, if he hold no portfolio, of nine other ministers: a minister attendant upon the king, a minister of the Interior, a minister of Finance, a minister of Industry and Commerce, a minister of Agriculture, a minister of Justice, a minister of Religion and Education, a minister of National Defence, and a special minister for Croatia-Slavonia.

777. The ministers attend the sittings of the chambers and play there the same part that the Austrian ministers play in the *Reichsrath* (sec. 762). The Hungarian ministers are, however, subject to a real responsibility to the parliament of the kingdom. The Magyars maintain a veritable majority in the Hungarian Houses, and they know their own minds and the right methods of party discipline, besides. They have been statesmen and rulers time out of mind, and the king's ministers in Hungary obey and represent the majority in parliament, resigning as of course when defeated.

778. **The Diet.** — The *Diet* (*Országgyülés*), the national representative body, consists of a Table of Magnates and a Table of Representatives. To the former go all hereditary peers who pay an annual land tax of three thousand florins, the highest officials of the Roman Catholic and Greek churches, certain ecclesiastical and lay representatives of the Protestant churches, eighty-four life peers appointed by the king, certain members *ex officio*, three delegates from Croatia-Slavonia, and those royal archdukes who have reached their majority and who own landed estates in Hungary. The Table of Representatives consists of four hundred and fifty-three members elected by direct vote for a term of five years. The membership of the House for ordinary business, however, is only four hundred and thirteen. The forty additional members represent Croatia-Slavonia; and, inasmuch as

that great province has an almost independent legislature of its own, its members in the national House vote only upon questions of national action which affect their own province. These subjects are understood to be, the army, trade, and finance. As must always happen where there is real ministerial responsibility, the lower House is the governing House. The Magnates yield, in the long run, every point upon which the purpose of the Representatives is definitely fixed.

779. The franchise rests upon the payment of a small amount of taxes on land or on income. Members of certain learned and professional classes, however, possess the franchise without any property qualification.

780. The president and vice-president of the upper House are nominated by the king.

781. As in the case of the Austrian representative bodies, so also in the case of the Hungarian, the king convenes and opens, and may close, adjourn, or dissolve them.

782. **Local Government.** — For purposes of local government Hungary is divided into shires, self-administered cities, and Communes. The organization is throughout substantially the same. In each area, — the Commune excepted, — there is a president who represents the central government; in each, without exception, there is an administrative committee which is the executive representative of the local body and an assembly, in part representative and in part primary (inasmuch as those who are most highly taxed are entitled to be present), with which rests the general direction of affairs.

783. **Croatia-Slavonia.** — There is not in Hungary the provincial organization which we have seen to exist in Austria (secs. 772, 773). Croatia-Slavonia is the only constituent part of the Hungarian lands which has its own separate *Landtag*. The organization of this territory is in all respects exceptional. It has been given legal rights which cannot be taken away from it without its own consent; and it has a distinct administration responsible to the king and to its own *Landtag*. It is nevertheless, an integral part of the Hungarian monarchy.

Sweden-Norway.

784. **The Danes.** — The territory of the three northern kingdoms of Denmark, Sweden, and Norway very early became a

home of the Teutonic peoples, a nursery of Teutonic strength, a peculiar possession of Teutonic institutions. It was from this northern land that the fierce 'Northmen' issued forth to win dominions in France, in Russia, and in Sicily; from it, too, came the Dane to lay his strong hand upon England. Its roving giants kept the world in terror of piracy and invasion for centuries together.

785. **Early Institutions of Sweden and Norway.** — The institutions of these strenuous northern folk were of the usual Germanic sort. Sweden and Norway were at first, like all the German countries, divided into a few score loosely confederated parts held together by no complete national organization or common authority. By degrees, however, the usual slow and changeful methods of consolidation wrought out of the general mass of petty political particles the two kingdoms of Sweden and Norway. In each a dominant family had worked its way to recognized supremacy and a throne. As in other Germanic countries of the early time, so in these, the throne was elective; but, as elsewhere, so also here, the choice always fell upon a member of the dominant family, and the kingly house managed most of the time to keep together a tolerably compacted power.

786. **Union of Denmark, Sweden, and Norway.** — Once and again intermarriage or intrigue united Sweden and Norway under the same monarch; once and again, too, Danish power was felt in the Scandinavian peninsula, and the house of Denmark obtained a share in the distribution of authority. Finally, in 1397, a joint council of deputies from the three kingdoms met at Kalmar, in Sweden, and effected the *Kalmarian Union*. This union resulted directly from the marriage of Hakon VI., joint king of Sweden and Norway, with Margaret, daughter of Valdemar of Denmark; the Council of Kalmar only put it upon a basis of clear understanding. It was agreed that the three kingdoms should acknowledge a common monarch; that, in default of heirs of the house then on the throne, the three kingdoms should elect their common monarch, by such methods of agreement as they might be able to devise; but that, whether under elected or under hereditary monarch, each kingdom should retain its own laws and institutions.

787. **The Independence of Sweden.** — For Norway this union with Denmark proved of long standing. Not until 1814 was it finally severed. Upon Sweden, however, Denmark maintained a very precarious and uncertain hold, now ruling her, again thrust out, favored the while only by her own power and by the sleepless mutual jealousies of the patriotic but selfish and suspicious Swedish nobles. At length, in 1523, Sweden was able to break finally away from the union. Her deliverer was Gustaf Eriksson, better known as Gustavus Vasa, who by force of a singular genius for leadership and war first drove the Dane out and then established the royal line which was to give to Europe the great Gustaf Adolf, the heroic figure of the Thirty Years' War. Gustaf Eriksson reigned for thirty-seven years (1523–1560), and with him the true national history of Sweden may be said to have begun. The house which he founded remained upon the throne of Sweden until 1818, and under the long line of sovereigns which he inaugurated the Swedish constitution was worked out through a most remarkable series of swings back and forth between the supremacy of the monarch and the supremacy of the royal council. According as the personal weight of the king was great or small did the royal power wax or wane.

788. **Oscillating Development of the Swedish Constitution.** — The old constitution of Sweden associated with the king a powerful council of nobles and an assembly of Estates. In the latter, the *Riksdag*, four orders had acquired representation, the nobles, the clergy, the burghers, and the peasants. For two hundred years the constitutional history of Sweden is little more than a changeful and perplexing picture of the ascendency now of the king, now of the Council or of the *Riksdag*, and again of the king, or of the Council and *Riksdag* combined. With Gustaf Adolf (1611–1632) originated the clumsy plan, retained until the present century, according to which each of the orders represented in the *Riksdag* acted separately in the consideration of national affairs, to the fostering of dissension among them. By dint of the masterful policy of Karl XI. (1672–1697), the power of the Crown was made absolute, the Council eclipsed. Karl XII., a great soldier, wasted the resources of the country and thereby prepared the way for a decline of the royal power. 1720 saw a

new constitution adopted which gave almost entire control of affairs to the Council and to a committee of one hundred drawn from the three first Estates of the *Riksdag;* and 1734 brought forth a new code of laws. Gustaf III., however (1771–1792), again reduced the Council from its high estate, and left to the *Riksdag* nothing but a right to vote against an offensive war. And so the constitution swung backward and forward until the present century.

789. **Bernadotte and the Accession of Norway.** — The great change which ushered in the present *régime* in Sweden came in 1814, when by the Convention of Moss (August 14) and the action of the Congress of Vienna, Norway was separated from Denmark and joined, by a throne, to Sweden. Norway had adopted a new and liberal constitution at Eidsvold on May 17, 1814 (in which it was provided, amongst other things, that all Acts should be signed by the ministers, 'by authority,' instead of by the king simply, as hitherto), and had chosen Kristian king. Upon the signing of the Convention of Moss, however, Kristian was obliged to resign; and until the formal ratification of the convention, on November 4, 1814, Norway was practically a republic. Acting without a king, she accepted Karl XIII. of Sweden as her sovereign, and obtained from him an acknowledgment of the constitution of Eidsvold. Karl (1809–1818) was childless; and in 1810 the Swedes, willing to please Napoleon, the master of Europe, chose as prince and successor to the throne Bernadotte, a man who had risen from the ranks to be one of the many distinguished generals bred in the service of Napoleon.

790. Bernadotte ascended the Swedish throne, with the title of Karl XIV., in 1818, but he had really come into the possession of full royal power in 1811, on account of the failing health of Karl XIII.

791. It turned out, however, that Bernadotte was more ready to oppose Napoleon than any longer to serve him. He threw the weight of Sweden on the side of the Allies, against the designs of France; and Norway's union with Sweden was confirmed when the Allies made their deal at Vienna.

792. **Norway's Fight for Independence and her New Constitution.** — Norway, though willing enough to escape the dominion

of Denmark, had not chosen without compulsion to exchange for it an equal bondage to Sweden. She at first refused to accept the settlement of 1814, rose in rebellion against all outside control, framed for herself a liberal constitution, and for a few months essayed once more the rôle of an independent kingdom. Her new constitution she managed to keep. With England's assistance, Bernadotte compelled her acquiescence in the union with Sweden, but he did not force upon her a surrender of the institutions which she had chosen to adopt.

793. The union between Norway and Denmark accomplished at Kalmar had resulted in the absolute power within his Norwegian domain of the common king. Allying himself with the citizen class in the national assembly, the king had been able to crush the nobles, and eventually to destroy all constitutional liberties. This he was the more readily enabled to do because the throne of Norway had early become hereditary and the Norwegian nobles had thus been robbed of that sovereign influence which, under the elective system of Denmark and Sweden, they had long contrived to retain. The new constitution adopted by the Norwegians at Eidsvold in 1814 naturally spoke a strong reassertion of national privileges and institutions. It was not only decidedly democratic, it was also not a little doctrinaire and visionary. Its framers, having too few Norwegian liberties to build upon, had recourse to the always futile resource of borrowing foreign experience. They embodied in the new fundamental law constitutional arrangements which they had taken from England and the United States and which found no suitable soil of Norwegian habit in which to grow. Still, her new constitution gave Norway a valuable impulse towards regulated political liberty; and, if not carried out at all points, was at least a promise of things hoped for and afterwards to be in great measure attained.

794. **Constitutional Contrast between Sweden and Norway.** — In Sweden there had been no such democratic revolution; and in point of institutions the two kingdoms were in 1814 very unequal yoke-fellows. Until 1866 Sweden retained her clumsy machinery of a *Riksdag* of four Estates, as well as many other constitutional arrangements which made the royal power predominant. Doubtless the standing example of Norway's more simple and liberal

constitution had much to do with the revision of the *Riksdag* undertaken in 1866; and it is unquestionable that the democratic ideas embodied in the fundamental law of the Norwegian kingdom have worked as a powerful leaven in Swedish politics. Slowly but surely, and principally by the movement of Sweden, the two countries have drawn towards each other in institutional development.

795. **The Fundamental Laws.** — The present fundamental law of Sweden-Norway consists of three parts: (*a*) the separate constitutional laws of Sweden, (*b*) the separate constitutional laws of Norway, and (*c*) the Imperial *Riks-Akten* of August, 1815, which binds the two countries together under a common sovereign. This last is, as far as Sweden is concerned, a mere treaty, having never passed the *Riksdag* as a constituent law of the kingdom; but for Norway it is an integral part of her law, having been formally adopted as such by the *Storthing*. (*a*) The separate fundamental laws of Sweden have never been embodied in any single written constitution, but consist of various laws regulative of the succession to the throne, passed in the period of dynastic change (1809–1810); of certain portions of the great enactments of February, 1810, which gave to the *Riksdag* an orderly arrangement of its four Estates and regulated the order of legislative business; of the enactments of June, 1866, which, abolishing the fourfold constitution of the *Riksdag*, substituted two popular houses; and of the laws guaranteeing freedom of the press, passed in May, 1810, and July, 1812. Taken together, these laws constitute a body of fundamental provisions slowly built up by Swedish statesmen upon the somewhat inconstant bases of Swedish constitutional precedent. Perhaps its most significant feature appears in the detail with which the enactments of 1810 enter into the regulation of the order and methods of business in the *Riksdag*. Under the former complicated division of that body into four separate houses minute regulative detail was of course unnecessary, and, as seen in the laws of 1810, this detail is illustrative of one of the chief and most interesting difficulties of constitutional development in Sweden. (*b*) The constitutional laws of Norway, on the other hand, are, equally from the nature of the case, very much more simple. They consist of

the Convention of Moss, drawn up in August, 1814, and confirmed by Norway in November of the same year; of the constitution framed by the Norwegians at Eidsvold in May, 1814, during the brief struggle against all foreign control; and of the imperial *Riks-Akten* of August, 1815, which Sweden has continued to observe as a treaty merely, but which Norway has made a part of her law.

796. **The Common Government: the King.** — The thong which binds Sweden and Norway together is the authority of their common king; but they are in effect separate kingdoms, and this authority has one character as respects Sweden and quite another as respects Norway. The fundamental laws of each kingdom constitute it a limited monarchy, but only in Norway does it seem to be the chief object of constitutional provision to limit royal power. Both the active and the obstructive parts of the king in legislation are much more considerable in Sweden than in Norway. In Sweden it rests exclusively with him to formulate what are there denominated 'economic laws': administrative laws, namely, regulative of trades, commerce, and manufacture, and of mines and forests. He is, moreover, the sole and sovereign author of police regulations, and of laws controlling vagrancy; he has power to make rules concerning the erection of buildings and to originate ordinances touching sanitary precautions and protection against fire. As regards all other laws he must act jointly with the *Riksdag;* though his veto is in every case absolute.

797. The *Riksdag* may, of course, advise the king concerning the economic and administrative legislation entrusted thus exclusively to him; but any action it may take has the force of advice merely. The only control it can exercise in such cases comes to it through its money power; it may withhold the money necessary to the carrying out of administrative or economic ordinances determined upon by the king.

798. In Norway, on the other hand, the king has no independent legislative powers, except during recesses of the *Storthing;* and his veto is only suspensive. Certain police regulations and certain ordinances touching particular branches of industry he may issue while the *Storthing* is not in session, but these are of force only until the *Storthing* comes together again. (Compare

sec. 770. His veto of bills passed by the *Storthing* may be overridden by the passage of the same bill (it must continue literally the same) by three successive *Storthings.*

799. This naturally renders the passage of bills over his negative an extremely tedious and difficult undertaking, and usually, in case of a very urgent disposition on the part of the *Storthing* to have its own way, a compromise measure is finally adopted, often at the express suggestion of the king. In two notable instances, however, — the abolition in 1821 of such noble titles as existed since the adoption of the democratic constitution of 1814, and the establishment of ministerial representation in the *Storthing* (1884), — the veto was overridden, through the persistence of the *Storthing*, by means of the constitutional passage of the measures proposed.

800. **The Throne.** — The royal majority is fixed at eighteen years. Women are excluded from the succession. The king must be of the Lutheran faith. He takes the throne under oath to obey the constitution and laws of the dual kingdom, and he must temporarily lay down the governing power when sick or out of the country, except when absent in the field of battle.

801. In case a vacancy occurs, the throne is to be filled by election, the choice to be made by the Swedish *Riksdag* and the Norwegian *Storthing* acting separately, if they can agree; or, if they cannot agree, by a joint committee of seventy-two (thirty-six from each body) assembled at Carlstad. This committee is to choose between the two candidates by secret ballot.

802. In the event of an interregnum or of the minority of the king, the administration of the two kingdoms is to be undertaken by a joint Council of State, consisting of the ten ordinary state councillors of Sweden and ten special representatives of Norway. If the interregnum or minority continue more than a year, however, the national representatives must be called together and given an opportunity to make other arrangements. If the king be sick or absent, his heir, if of age, governs in his stead.

803. **Foreign and Common Affairs.** — Almost the only common affairs of the two kingdoms which are matters, not of agreement between them, but of sovereign action on the part of the king acting for both, are those affairs which affect the relations of Norway and Sweden with foreign countries. In this field of foreign affairs the king has power to declare war and conclude peace, to form or dissolve alliances, to use ships of war or troops, to send or recall ambassadors, — has, in brief, all the prerogatives of sovereignty. His power to act thus for both kingdoms does not,

however, merge Sweden and Norway as regards international relations: they retain their separateness and individuality in the family of nations; and the king may, and often does, conclude treaties affecting one of his kingdoms only. Peace and war are inevitably, however, common to both kingdoms.

804. The king is assisted in these functions by no common minister of foreign affairs: he acts through the Swedish minister, Norway having no minister of foreign affairs at all. Certain other ministers of state must be present, however, when the Swedish foreign minister lays diplomatic affairs before the king; and when such matters directly affect Norway a Norwegian minister of state must be present. Norwegians find ground for serious objection to the present constitutional arrangements existing between the two countries in their own too slight hold upon the conduct of foreign affairs.

805. **War.** — If, in the exercise of his great international functions, the question of war arise, the king must take the opinion of a joint Council of the two kingdoms (sec. 809), but he is not legally bound by its opinions. He must himself assume the full responsibility of deciding the question.

806. A certain limitation rests upon the royal power as regards the use of the Norwegian forces. He may freely call out the whole military force of Sweden, both land and naval, but he may not use the Norwegian troops of the line without the express consent of the *Storthing*. The Norwegian militia, moreover, cannot under any circumstances be employed outside of Norway, and it is within the competence of the *Storthing* at any time to increase the militia at the expense of the regular line. It has indeed actually done this.

807. **Legislative Control of Foreign Relations.** — Of course, too, the king must in every exercise of his royal powers act within the limits of the fundamental law. He cannot enter into any agreement with a foreign country which is not consistent with the constitutions of his kingdoms; he may not conclusively pledge the legislatures of his kingdoms to any action or to any expenditure of money; and he is in a large measure dependent upon their coöperation for the execution of treaties. But these are the familiar limitations of modern representative government.

808. **Concurrent Legislation.** — Matters which are of common interest to the two countries, but which lie outside of the prerogatives of the common king, are regulated by concurrent identical resolutions or laws passed by the *Riksdag* and the *Storthing* sev-

erally. Important examples of such concurrent laws are those which affect the money systems of the two countries, and those which concern the Lapps. The money systems of the two countries are not the same; but there is a regulated system of exchange.

809. **The Joint Councils.** — The place of a common ministry to advise the king touching questions which affect the interests of both kingdoms is taken in Sweden-Norway by a complicated system of Joint Councils of State. Whenever any matters are considered in the Swedish Council of State at Stockholm which concern Norway also, the Norwegian minister resident and the two Norwegian councillors who regularly attend the king must be called in (sec. 823); and whenever practicable the opinion of the whole Norwegian Administration must be sought and obtained. Whenever, on the other hand, matters which directly affect Sweden are under debate in the Norwegian Council of State at Christiania, that Council must likewise be reinforced by the presence of three Swedish ministers. There is thus upon occasion both a Swedish-Norwegian and a Norwegian-Swedish Joint Council of State; and not a little doubt exists among publicists in the two kingdoms as to what particular matters are proper to the consideration of one and what to the consideration of the other of these anomalous bodies. The whereabouts of the king, however, serves as a rough criterion as to the predominance of Sweden or of Norway in these Councils.

810. The sphere of these Councils is quite extended. It includes the consideration of questions of war and peace, the oversight and the costs of the diplomatic service, inter-territorial relations, the balance of financial accounts between the two countries, and all reciprocal affairs in which the intimate coöperation of the two kingdoms is necessary.

811. **Citizenship.** — There is no common citizenship for the two kingdoms, although Swedes are allowed by Norwegian law to acquire citizenship in Norway by mere residence. Certain reciprocal advantages are, however, accorded: citizens of either country may, for instance, own land in the other; interstate trade is encouraged, and a joint-ownership of vessels is facilitated. Legal banishment from one kingdom, moreover, is banishment from the other.

812. **The Government of Sweden.** — In all matters of internal legislation and administration the two kingdoms are as distinct as if no legal relations existed between them. Each has its own separate treasury, its own bank, its own money system, its own army and navy; and each has its own complete administrative and legislative organization.

813. **The Swedish Executive: the King and Council.** — Sweden's theoretical development in the field of constitutional law has been less complete than her practical development. Her fundamental law recognizes only a twofold division of governmental powers, into Executive and Legislative. Judicial power is supposed to reside in the king, and is in theory indistinguishable from the Executive power. As a matter of practice, however, though the king nominates the judges, they are quite as independent of him as they would be were Swedish theory upon this head more advanced.

814. The position and character of the Swedish Executive are in some respects peculiar. The king is charged to a quite extraordinary extent not only with the general oversight but also with the detail of administration. The ministers are not so much directing heads of departments as councillors of state assigned the duty of advising the monarch. They have seats in the *Riksdag* with a full voice in all its debates and the right, exercised in the name of the king, to initiate legislation. This connection with the legislature involves also, as a natural consequence, frequent resignations of the ministers in cases of unalterable disagreement between themselves and one or both of the chambers; but ministerial responsibility is not as yet a recognized principle of the constitution. Not only the full equality of the two chambers stands in the way of its development, but also the authority of the king. The ministers serve too many masters to be altogether responsible to any one of them. In respect of her Executive, therefore, Sweden may be said to stand half-way between England and France, where ministers are wholly responsible to one house of the legislature, and Germany, where the ministers are responsible to neither, but to the sovereign alone.

815. The executive departments in Sweden are the following seven: Foreign Affairs, Justice, War, Marine, Interior, Finance, Educational and Ecclesiastical Affairs. At the head of the Council of State (the collective

ministry) stands a prime minister who is not generally assigned any specific executive duties. The division of business among the departments rests entirely with the king. Although the king governs, however, so far as one man may, every decree which he issues must be countersigned by the head of the department whose affairs it concerns.

816. **The Riksdag.** — The national *Riksdag* consists, as in most other governments, of two chambers. Neither, however, is a house of lords; both chambers, on the contrary, are representative in their make-up. One, the upper chamber, consists of one hundred and fifty members chosen for a term of nine years by the representative bodies of the counties and the councils of the larger towns: these electoral bodies being in their turn chosen upon the basis of a complicated communal franchise granted chiefly on property or income. No one is eligible to be elected a member of this chamber who has not possessed for at least three years previous to the election property of the taxable value of some twenty-two thousand dollars, or an annual income of at least eleven hundred dollars. The lower house, numbering two hundred and thirty members, is chosen for a term of three years by the electors of the towns and of the rural districts, either by direct or by indirect vote as a majority of the electors prefer. The rural districts are allowed one member for every forty thousand inhabitants, the towns one for every ten thousand inhabitants, the latter being thus given the preference in representation. For both electors and members there is a small property or income qualification.

817. This does not, however, result in the return of a majority of town members. Only eighty members are returned by the towns, one hundred and fifty by the rural districts.

818. The proportion of representation in the upper house is one member for every thirty thousand inhabitants. The rural population has by this arrangement a larger representation in the upper than in the lower house. Only the municipal councils of those towns participate in the elections to this house whose population is not represented in the county councils. Such towns are only five in number: Stockholm, Göteborg, Malmö, Norrköping, and Gafle.

819. The members of the upper house are not elected for a *joint* term of nine years, but each member is chosen to serve that length of time: so that if any member be chosen to fill a vacancy his term will, of course, overlap the terms of the members previously elected. The body is thus given a sort of continuous existence.

820. **Joint Legislation upon Financial Questions.** — It is a peculiarity of Swedish constitutional arrangements that, under some circumstances, the two houses are fused. Legislative business is under the general direction of a joint committee of the two chambers, and in case of a difference of opinion between the houses upon financial matters a decision is reached in joint session. The houses meet in joint session for no other purpose, however.

821. **Local Government.** — Local government rests in Sweden upon very ancient historical foundations. The primitive Germanic institutions of self-government have there never been entirely overlaid or lost. In the Communes, the oldest and, so to say, most natural areas of local administration, there is almost complete autonomy, the people themselves acting, where the size of the community does not forbid, in primary assemblies, quite after the immemorial fashion. The counties are more artificial constructions of a later date and are presided over by officers appointed by the king; but in them also popular representative councils play an important supervisory part.

822. **Changes in the Constitution.** — Changes in the constitution can be quite simply effected. If proposed by one *Riksdag* and adopted by the next (the next after an election for the lower house) they become, with the royal assent, incorporated parts of the fundamental law.

823. **The Government of Norway: the Norwegian Executive.** — The king stands in substantially the same relations to his Council in Norway that he occupies towards his Council in Sweden: the supreme deciding authority is his. Alike in Norway and in Sweden he must take the opinion of his ministers upon public questions; and when he is in Sweden he may not take any decision upon Norwegian affairs without hearing the advice of the three Norwegian councillors who attend him there (sec. 824). On important Norwegian measures not demanding haste he must even, when in Sweden, ask the written opinion of the whole Norwegian Council. But the decision is his in any case. His constant absence in Sweden, nevertheless, gives a weight in government to the Norwegian Council which its Swedish counterpart never possesses. The king must leave to that Council, acting

under the presidency of a viceroy or of the prime minister, the major part of the governing authority, including even his veto; and his power to reverse its action is strictly limited. As regards their relations to the national legislature the Norwegian do not differ greatly from the Swedish ministers. They sit, without voting, in the *Storthing;* they have the privilege of initiative, and they are under no constitutional obligation to resign in case of defeat (sec. 814).

824. The Norwegian Council of State consists of two parts, (*a*) a minister of state and two councillors, all three of whom accompany the king, and (*b*) the 'Government' proper, consisting of a minister of state, as prime minister, and six or seven other ministers, according as the prime minister has or has not a portfolio. For the administrative departments in Norway, as in Sweden, are seven in number; namely, Ecclesiastical Affairs, Justice, Interior, Finance and Customs, War (including, since 1885, the navy), Public Works, and Audit. The division of business among the several departments rests with the king.

825. **The Storthing.** — The national *Storthing* has a character and constitution quite peculiarly its own. It is, in fact, a single body, elected as a whole, but self-divided for ordinary legislative business into two sections, a *Lagthing* and an *Odelsthing.* It is chosen for a term of three years and consists of one hundred and fourteen members, thirty-eight (or one-third) of whom are returned by the towns, seventy-six (or two-thirds) by the rural districts.

826. This proportion is fixed by law and can be changed only by constitutional provision. The franchise rests upon a property qualification, and the voting is indirect. In the cities the secondary electors are chosen in the proportion of one to every fifty voters; in the country districts in the proportion of one for every one hundred voters.

827. Upon the assembling a new *Storthing* one-fourth of its members are selected, by the *Storthing's* own vote, to constitute the *Lagthing;* the remaining three-fourths constitute the *Odelsthing;* and with the *Odelsthing* remains the right to originate all measures of legislation. The *Lagthing* is thus, as it were, merely a committee of the *Storthing* set apart as a revisory body, a sort of upper chamber. It is only with regard to ordinary bills, however, that the *Storthing* acts in this way as two houses. Constitutional and financial questions it considers as a single body.

828. In case the *Lagthing* twice reject any measure sent to it by the *Odelsthing*, the difference is decided in joint session by a two-thirds vote.

829. **Local Government.** — Local government in Norway does not rest upon the same undisturbed foundations of historical tradition which in Sweden uphold it. The laws which give to it its organization date from 1837. By these the country is divided into districts and communes, in the government of both of which the people are represented, but in both of which officials appointed by the central Government exercise considerable powers of oversight and control.

830. **Changes of Constitution.** — Constitutional amendment is effected in Norway substantially as in Sweden. Proposals of amendment must be introduced at the *first ordinary session* of the *Storthing* held after an election, and must be finally acted upon, without alteration, during the first session of the next *Storthing*. The votes of two-thirds of the members present are required for the passage of such amendments, and the king's veto operates as in other cases (sec. 798).

831. **The Two Countries.** — More than eighty years of successful union (1814–1897) now stand behind this singular dual monarchy. The attitude of Sweden towards her partner land has been marked during most of this period, as the attitude of the stronger towards the weaker party should be, by not a little forbearance and consideration. The two countries have concurred in removing also all the more serious causes of possible commercial irritation between them, though a customs tariff still burdens trade between them. Sweden, nevertheless, has the preponderant weight and influence in all common affairs, particularly in the regulation of the foreign relations of the two kingdoms (sec. 803). Her policy, moreover, is often, when considered from Norway's point of view, a Swedish policy merely, looking directly or indirectly towards Swedish control. Not a few causes of jealousy, not a few points of friction, remain in the system. An influential party in Norway, therefore, desires an even larger measure of independence and home rule than is now possible without fundamental constitutional change, suspecting, probably not without just cause, that it is the object of a certain party, at

any rate, if not of all parties, in Sweden, to weaken the guarantees of liberty now existing, and to draw Norway even further within the circle of Swedish control. The future, it would seem, must assuredly bring forth either greater consolidation of the dual government or a new and better definition and guarantee of Norway's separate rights.

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X.

THE GOVERNMENT OF GREAT BRITAIN.

I. Central Government.

832. **Origin of the Constitution.** — The history of government in England, as in Germany, begins with the primitive politics of the Teutonic races. Those great race movements of the fifth century which put the Frank into the Roman's place in Gaul put the Angles and Saxons in the place of the Roman in Britain. The first Teutons who made a permanent settlement in Britain (A.D. 449) did not find the Roman there; the imperial legions had been withdrawn from the island almost forty years before (A.D. 410) to serve the Empire in her contest with invading hosts nearer home. But the new-comers from the lowlands about the Elbe and the Weser found there many splendid and impressive monuments of the civilization which everywhere kept company with Roman dominion. What effect these evidences of the displaced system of Rome may have had upon the rough seamen who made the new conquest, or how much of Roman influence may have remained with the people of Britain to be handed on, in faint reproduction, to future masters of the island, it is impossible to say. Certainly, however, there was nothing of Rome's handiwork in the forms of government which the Teutons established at the basis of English politics. Those forms were their own. They were reproductions, as nearly as the conditions of conquest would permit, of the institutions which the Romans had seen in use among their redoubtable foes beyond the Rhine before ever the Empire had suffered serious inroad.

833. **Primitive Teutonic Institutions.** — These institutions had none of the national character which they were in the course of

time to acquire. They illustrated the well-known historical sequence, in which local tribal government always precedes central national government. Men governed themselves as families and small communities before they were governed as nations. For the Germans of that early time the village was the centre of political life; national organization they at first scarcely knew except for purposes of war; kinship among them was honorary and typical rather than real. The freemen of each little community in times of peace directed their own affairs with quite absolute freedom in village meeting. Even in war each freeman had a vote in the distribution of booty and could set his own imperative individuality as a more or less effectual check upon the wilfulness of his commander (secs. 287–294). A very fierce democratic temper seems to have ruled in the politics of that rough primitive time. And it is not at all likely that this temper was a whit abated among the hardy pirates, as tempestuous as the northern waters which they braved, who founded new tribal kingdoms in Britain in the fifth century.

834. **Institutional Changes effected by Conquest.** — Concerted, organized movements for conquest did the same thing for the Angles and Saxons that they did for the Franks (secs. 300, 301): they made real kingship necessary as an abiding basis for national organization. The military leader was of necessity constituted permanent king, the same cohesion being needed to follow up and enjoy conquest that had been needed to effect it. But the new kingdoms were at first quite small, — small as the island was, it held many such, — and the internal organization of the tribes was probably not deeply affected by the fact that a throne had been set up. The people gathered, as was their long-time wont, into more or less compact but always small communities, round about the homesteads and villages the Romans had built; enjoying their lands according to some system of ownership which left the chief pastures and the principal water supply open to use by all and reserved only the arable land to separate use by individuals. Justice and government still proceeded, as of old, at first hand, from the meeting of village freemen.

835. **The Hundred-moot and the Folk-moot.** — But there was, besides, a wider organization, possessing features which possibly

had not been quite so fully and symmetrically developed and integrated in earlier Germanic practice. Communities were combined into 'hundreds,' and it was a combination of 'hundreds,' doubtless, that constituted the little kingdoms of the first periods of Saxon dominion, — some of which at any rate became the 'shires' or counties of the later times when all England was united under one rule. The 'hundred,' like the smaller units of the system, the several villages or communities, had its 'moot' or meeting, composed of the priest, the reeve, and four men from each township within its limits. The principal functions of this hundred-moot were those of a court: for the hundred was distinctively a judicial rather than an administrative district. Above the hundred-moot, at the top of the primitive system, was the general folk-moot, a general assembly of the freemen, playing the same part as tribal or national council that Tacitus had seen similar assemblies play in Germany in the first century.

836. **English Kingdom and English County.** — When the English kingdoms were many, each, probably, had its general council, which sat under the presidency of the king, and which advised with him concerning the common interests with some at least of the old authoritativeness which its conclusions had possessed before the new kingship had been created. When England had been made a single kingdom, in the later days when the Norman conquest was drawing near, these divisions of the land, these kingdoms which had once had independent political life, sank to the rôle of counties, and their folk-moots, which had once been national assemblies, became mere shire-moots, mere county courts, presided over by the sheriff as representative of the king, the bishop as representative of mother Church, and the ealdorman as representative of the tribe, and composed of the landowners of the shire, the reeve, priest, and four men from each township, twelve representatives from each hundred, and all officials.

837. **The Witenagemot.** — National authority, meantime, had passed, so far as it had passed to any assembly, to an assembly of another kind, to a great council called the *Witenagemot*, or Assembly of the Wise. We have no certain knowledge of the exact character of this famous national body; but we are probably warranted in concluding that it was formed more or less closely

upon the model of the assemblies which it had supplanted. The national councils of the smaller kingdoms of the earlier time, which had now shrunk into mere shire courts, handed on their functions of general counsel, and in theory also, it may be, their organization, to the *Witenagemot*. Possibly it was within the right of every freeman to attend and vote in this great meeting of the nation; but as a matter of fact, its membership was limited, apparently from the first, to the chief men of the shires and of the royal household. To it came the sheriffs, the ealdormen, the bishops, and the chief officers and thegns about the king's person. When the king wished a veritable national council he would sometimes summon the moots of all the shires to meet him in grand *Mycel-gemót* at some central point in the kingdom and declare their assent to his laws. This he did to spare himself the trouble of taking his laws to each shire moot in turn, as it had once been the king's custom to do.

838. **Powers of the Witenagemot.** — The powers of the *Witenagemot* were very great indeed, — in theory always, perhaps at first in practice also. To it belonged the old popular prerogative of electing, or upon occasion deposing, the king. It gave or withheld its consent to grants of the public land. It was the supreme court of the kingdom, for both civil and criminal cases. It shared with the king the lawmaking and appointing power, and joined him in the imposition of taxes. As the king grew in power and influence, the coöperation of the *Witenagemot* in judgment and legislation became more and more a matter of form only; but always there were two or three yearly meetings of the body, and its action, though in most things merely formal and perfunctory, was yet a necessary and, symbolically, a valuable form, preserving, as it did, the memory, if no more, of the nation's freedom.

839. **The Norman Feudalization.** — With the Norman conquest came profound changes in the government of England. The chief officers of the shire became royal officers merely, the ecclesiastical authority being set apart to itself, and the ealdorman being shut out from all administrative functions. The land William confiscated in vast quantities, in the ruthless thoroughness of his conquest, because of the stubborn resistance of its English own-

ers, and granted away in new estates to Normans or to submissive Englishmen, to be held in feudal subjection to himself. The feudal system, so familiar to the historian of the Continent, with its separated baronial jurisdictions and its personal dependencies of vassal upon lord and of lord upon overlord, was perfected in England also. Township courts in most places gave way to baronial courts; hundred-moots lost their one-time importance; and all judicial power that did not pass into the hands of feudal lords tended to pass to the court of the sheriff, the king's lieutenant in the shire. Still William kept the barons under; he did not suffer their power to become threatening to his own, but kept them always dependent upon himself for the continued exercise of their privileges.

840. **The Great Council of the Norman Kings.** — More important still, he preserved, with modifications to suit his change of system, the national assembly of the Saxon polity. He claimed to come to the throne by natural right and legal succession, not by conquest, and he sought to continue, so far as might be, the constitution under which he claimed succession. He sought and obtained formal election to the throne, as nearly as possible in accordance with the ancient forms; and, his throne secure, he endeavored to rule within the sanction of ancient custom. He maintained the *Witenagemot*. But its character greatly changed under his hands. Revolt hardened his rule, to the exclusion of the old national element from the central assembly of the realm. As the new organization of the country assumed a feudal character of the Norman type, that new character became mirrored in the composition of the royal council. The *Mycelgemót* merged in the Great Council (*magnum* or *commune concilium*) of the king's tenants-in-chief. To it came at first, besides the earls, the barons, and the knights, who either in fact or in feudal theory held their lands of the king, the archbishops also, the bishops, and the abbots; subsequently, however, even these ecclesiastical members were admitted only as barons, as holding land of the king and so members of the feudal hierarchy. In theory, it would seem, every landowner was entitled to claim a seat in this Council; it was meant to hold the place of a national assembly which could speak for the governing classes; but in

fact only the greater barons and churchmen as a rule attended, and 'tenure by barony' became at length the only valid title to membership. The development of the Great Council of the Norman kings is the central subject of early English constitutional history; for from it may be said to have sprung the whole effective organization of the present government of England. Out of it, directly or indirectly, by one process or another, have been evolved Parliament, the Cabinet, and the courts of law.

841. **The Feudal System in England.** — England was not feudalized by the Normans. Feudalization had grown there, as elsewhere, with the growth of Teutonic politics, under Saxon and Dane as under Frank and Goth. Society in England, as on the Continent, had divided into ranks of nobles, freemen, and slaves bound together by personal fealty and the principles of landownership. What the Norman did was to give new directions to the indigenous growth of feudalism. The system had not gone to such lengths of disintegration in England as it afterwards went on the Continent, and William the Conqueror's first care when compacting his power in the island was to subordinate all feudal elements permanently to the Crown. He saw to it, by the unhesitating use of his great power, that no baron should be able to cope with the king without wide combination with other barons, such as watchful kings could probably always prevent; and he dulled the edge of hostile feeling by giving to the greater barons of the kingdom a function of weight in the management of affairs by bringing them into peaceful and legitimate combination in the Great Council, which he called together three times every year, and whose advice he never refused at least to hear. The Council retained, formally at any rate, the right to choose the king, and all laws were declared to be enacted by and with its advice and consent.

842. **Character of English Institutional Growth.** — It has been noted as a leading characteristic of the constitutional history of England that her political institutions have been incessantly in process of development, a singular continuity marking the whole of the transition from her most ancient to her present forms of government. It is not a history of breaks or of new establishments, or of successive new creations of instrumentalities of legislation and administration: all the way through it is a history of almost insensible change, of slow modification, and of unforced, almost of unconscious, development. Very great contrasts appear between the character of her government in one age and its character in another age distant one or more cen-

turies from the first; but it is very difficult to perceive any alteration at all when comparison is made from generation to generation. Almost no changes can be given exact dates: each took place 'about' such and such a year, or in this or that long reign. The whole process, therefore, is one which may be outlined in brief epitome: its stages are long, its features large, its details unessential to clearness.

843. **The Course of Development.** — In briefest summary the facts are these: the Great (or National) Council itself became the Parliament of the realm; those of its members, as originally constituted, who were state officers and chief officials of the court became a Permanent royal Council, out of which, in course of time grew the more modern Privy Council and at length the Cabinet; and whose members of the Permanent Council whose duties were financial and judicial gradually drew apart from the rest for the exercise of their functions, their work being finally divided among them according to its nature, and the several bodies into which they thus fell apart becoming, in the end, the courts of Exchequer, of Chancery, and of common law.

844. **The Permanent Council.** — The body of state and court officers whom the king kept always about him as his 'Ordinary' or Permanent Council were originally all of them members of the Great Council and seem at first to have acted as a sort of "committee, or inner circle," of that greater body. The Great Council met but three times in the year; its organization was not permanent; its membership varied, both numerically and personally, from year to year. The officers of the permanent service, on the other hand, were always within easy reach of consultation; they were in a certain sense picked men out of the larger body of the national Council; it was natural that they should be consulted by the king and that their advice, given in their collective capacity as a smaller council, should carry with it the weight of their connection with the more authoritative Great Council. As a matter of fact at any rate, they acquired powers almost coincident with those of the national body itself. Their powers came, indeed, to possess an importance superior even to those of the more august assembly, being exercised as they were, not intermittently or occasionally, but continuously; not with a mere out-

side acquaintance with the posture of affairs, but with an inside intimacy of knowledge.

845. **Composition of Permanent Council.** — Under the Norman kings the membership of the Permanent Council consisted, usually, of the two archbishops (of Canterbury and of York), the Justiciar, the Treasurer, the Chancellor, the Steward, the Marshall, the Chamberlain, and the Butler, with the occasional addition of other officials, such as the king's Sergeant, and of such bishops and barons as the sovereign saw fit from time to time to summon. There was, however, no fixed rule as to its composition. Possibly every baron, as a member of the Great Council, could, if he had so chosen, have attended the sittings of this section of the Great Council also, which, while the Great Council was not in session, masqueraded as its deputy and proxy. Practically, it would seem always, as a rule, to have lain within the king's choice to constitute it how he would.

846. **The Powers of the Permanent Council** were enormous: were as large as those of the king himself, who constituted it his administrative, judicial, and legislative agent. Its "work was to counsel and assist the king in the execution of every power of the crown which was not exercised through the machinery of the common law";[1] and "the king could do nearly every act in his Permanent Council of great men which he could perform when surrounded by a larger number of his nobles; except impose taxes on those nobles themselves."[2] But the Permanent Council very early ceased to act as a whole in the discharge of all its functions alike. Itself a committee, it presently, in its turn, began to split up into committees.

847. **The Law Courts.** — Men specially learned in the law were brought into its membership, the later kings not hesitating, when the needs of the service demanded, to introduce commoners, as the Council drifted away from even its nominal connection with the Great Council; and to these the financial and judicial functions of the Crown were more and more exclusively entrusted. (Compare sec. 379.) It was not long before (*a*) a separate *Court of Exchequer*, which was at first charged principally with the

[1] Stubbs, *Constitutional History of England*, Vol. III., p. 252.

[2] A. V. Dicey, *The Privy Council*, p. ii.

audit of finance accounts, had been permanently assigned its special 'barons' as Justices, and had acquired jurisdiction over all cases in which the king was directly concerned; (*b*) another special bench of judges received, as a *Court of Common Pleas*, jurisdiction over all civil cases between subject and subject; (*c*) still another came to figure as a supreme court, or *Court of King's Bench*, which always accompanied the sovereign wherever he went, which was in theory presided over by the king himself, and which was empowered to supervise local justice and itself control all cases not specially set apart for the hearing of other courts; and (*d*) the Chancellor, who had once been merely president, in the king's absence, of the Permanent Council when it heard appeals in its judicial capacity, absorbed to himself, in his *Court of Chancery*, the whole of that so-called 'equitable' function of the Crown by virtue of which the king granted relief to suitors for whose cases the common law provided no adequate process. The Chancellorship was thus put in the way of attaining to its later-day partial ascendency over the 'courts of law.' This process of the differentiation and development of the courts began in the early years of the twelfth century and may be said to have been completed by the middle of the fourteenth.

848. **Parliament.** — Meantime the national body, the Great Council, from which the Permanent Council and courts had been derived, had had its own expansions and changes of form and had taken on a new character of the utmost significance. Not greatly altered in its composition during the century which followed the Norman conquest, the Great Council was profoundly affected by the outcome of Magna Charta (A.D. 1215) and the momentous constitutional struggles which followed it. It was then that the principle of *representation* was first introduced into the constitution of Parliament and that commoners as well as nobles were given seats in the national assembly. The archbishops, bishops, and abbots attended as of course, as always before, and the earls and greater barons held themselves equally entitled to be summoned always by special personal summons; but the lesser barons, who formerly had been called to the Council, not by personal summons, but only by a general summons addressed to them, along with all tenants-in-chief, through the sheriffs of the counties,

had given over attending because of the expense and inconvenience of the privilege, and were accordingly no longer called. Their place was filled by representation. Writs addressed to the sheriffs commanded the election of representatives of the lower clergy and, more important still, of representatives (knights) of the shires and (burgesses) of the towns. The Parliament which Edward I. summoned in 1295 contained all these elements and established the type for the composition of all future Parliaments.

849. In the fourteenth clause of Magna Charta John was made to promise that, besides summoning the archbishops, bishops, abbots, earls, and greater barons severally, by special personal letters, he would summon all lesser barons also by a general summons, through the sheriffs and bailiffs. But this general summons failed of the desired effect.

850. Representatives from the towns were summoned first in 1265 by Earl Simon of Montfort, who knew that he could count upon the support of the commons of England in his contest with the king, Henry III., and who called burgesses to the Parliament which he constituted during the brief period of his supremacy in order to give open proof of that support. Edward I. followed Montfort's example in 1295, not because he was deliberately minded to form a truly representative assembly as a wise step in constitutional development, but because he wanted money and knew that taxes would be most readily paid if voted by an assembly representing all classes.

851. Representatives from the shires (knights) had often been called to Parliament before 1265. Step by step, first one element of the nation and then another had been introduced into Parliament: first the lesser barons, by general summons, — only, however, to drop out again, — then the gentry of the shires by election in the counties, finally the burghers of the towns by similar election in county court.

852. **Genesis of the Two Houses.** — Such a body as the Parliament summoned by Edward was, however, too conglomerate, too little homogeneous to hold together. It did not long act as a single assembly; but presently fell apart into two 'houses.' Had the lower clergy continued to claim representation, there might and probably would have been three houses instead of two. But, instead of setting up a separate house in the civil Parliament, the clergy drew apart for the creation of an entirely distinct body, which, under the name of 'Convocation,' was to constitute a separate ecclesiastical parliament, devoting itself exclusively to the government of the Church. Their share in the management

of temporal affairs they left altogether to the 'spiritual lords,' the few greater magnates of the Church who retained their places in the national council, and to such lay representatives as the clergy could assist in electing to the lower house.

853. There were left, therefore, in Parliament two main elements, lords and commoners. The lords, to whom the archbishops, bishops, and abbots adhered by immemorial wont, formed a house to themselves, the House of Lords. The commoners from the towns, who were soon joined by the middle order of gentry, the knights of the shires, who were neither great lords summoned by personal summons nor yet commoners, formed the other house, the House of Commons. These changes also were completed by the middle of the fourteenth century. Parliament was by that time, outwardly, just what it is now.

854. **The Privy Council.** — The Great Council and its direct heir, Parliament, were not a little jealous of the enormous powers wielded by the preferred counsellors of the king whom he maintained in permanent relations of confidence with himself, and through whom he suffered to be exercised some of the greatest of the royal prerogatives. Especially did the arrangement seem obnoxious when the vitality of the Permanent Council passed to a still smaller 'Privy' Council. This body was to the Permanent Council what the Permanent Council had been to the Great Council. It was still another "inner circle." It emerged during the reign of Henry VI. (1422–1461). The Permanent Council had become too large and unwieldy for the continuance of its intimate relations with the sovereign; it could no longer be used as a whole for purposes of *private* advice and resolution; and the king separated from the 'ordinary' councillors certain selected men whom he constituted his *Privy* Council, binding them to himself by special oaths of fidelity and secrecy. From that moment the Permanent Council was virtually superseded, and the Privy Council became the chief administrative and governing body of the realm.

855. **The Privy Council assumes Judicial Powers.** — Many of the judicial prerogatives which really belonged to the king when sitting in his Great Council, or Parliament, had been claimed for the king's Permanent Council: hence the distinct law courts

which were developed from its midst (sec. 847); and the same rights of exercising the powers of a court which had been assumed by the Permanent Council were in the later time arrogated to itself by the Permanent Council's proxy, the Privy Council. Out of it came, in course of time, the well-remembered Council of the North, the hated Star Chamber, and the odious High Commission Court, which were not abolished until 1641, when that great revolution had fairly set in, which was to crush arbitrary executive power forever in England, and to usher in the complete supremacy of Parliament.

856. **Origin of the Cabinet.** — Meanwhile, long before the parliamentary wars had come to a head, the same causes that had produced the Permanent and Privy Councils had again asserted their strength and produced the *Cabinet*, still a third "inner circle," this time of the Privy Council; a small body selected for special confidence by the king from the general body of his counsellors, and meeting him, not in the larger council chamber, but in a 'cabinet,' or smaller room, apart. The Privy Council had, in its turn, become "too large for despatch and secrecy. The rank of Privy Councillor was often bestowed as an honorary distinction on persons to whom nothing was confided, and whose opinion was never asked. The Sovereign, on the most important occasions, resorted for advice to a small knot of leading ministers. The advantages and disadvantages of this course were early pointed out by Bacon, with his usual judgment and sagacity; but it was not till after the Restoration that the interior Council began to attract general notice. During many years old-fashioned politicians continued to regard the Cabinet as an unconstitutional and dangerous board. Nevertheless, it constantly became more and more important. It at length drew to itself the chief executive power, and has now been regarded during several generations as an essential part of our polity. Yet, strange to say, it still continues to be altogether unknown to the law. The names of the noblemen and gentlemen who compose it are never officially announced to the public; no record is kept of its meetings and resolutions; nor has its existence ever been recognized by any Act of Parliament."[1]

[1] Macaulay, *History of England*, Vol. I., pp. 197, 198 (Harper's ed., 1849).

857. **The Development of the Cabinet.** — The Cabinet first comes distinctly into public view as a preferred candidate for the highest executive place in the reign of Charles II. It is now the central body of the English Constitution. The steps by which it approached its present position are thus summarized by a distinguished English writer: —

"(1) First we find the Cabinet appearing in the shape of a small, informal, irregular *Camarilla*, selected at the pleasure of the Sovereign from the larger body of the Privy Council, consulted by and privately advising the Crown, but with no power to take any resolutions of State, or perform any act of government without the assent of the Privy Council, and not as yet even commonly known by its present name. This was its condition anterior to the reign of Charles I.

"(2) Then succeeds a second period, during which this Council of advice obtains its distinctive title of Cabinet, but without acquiring any recognized status, or *permanently* displacing the Privy Council from its position of *de facto* as well as *de jure* the only authoritative body of advisers of the Crown. (Reign of Charles I. and Charles II., the latter of whom governed during a part of his reign by means of a Cabinet, and towards its close through a 'reconstructed' Privy Council.)

"(3) A third period, commencing with the formation by William III." of a ministry representing, not several parties, as often before, but the party predominant in the state, "the first ministry approaching the modern type. The Cabinet, though still remaining, as it remains to this day, unknown to the Constitution," had "now become *de facto*, though not *de jure*, the real and sole supreme consultative council and executive authority in the State." It was "still, however, regarded with jealousy, and the full realization of the modern theory of ministerial responsibility, by the admission of its members to a seat in Parliament," was "only by degrees effected.

"(4) Finally, towards the close of the eighteenth century, the political conception of the Cabinet as a body, — necessarily consisting (*a*) of members of the Legislature (*b*) of the same political views, and chosen from the party possessing a majority in the House of Commons; (*c*) prosecuting a concerted policy; (*d*)

under a common responsibility to be signified by collective resignation in the event of parliamentary censure; and (*e*) acknowledging a common subordination to one chief minister, — took definitive shape in our modern theory of the Constitution, and so remains to the present day."[1]

858. **Parliament and the Ministers.** — The principles concerning the composition of the modern Cabinets which are stated in this last paragraph of Mr. Traill's summary may be said to have been slowly developed out of the once changeful relations between Parliament and the ministers of the Crown. As I have said (sec. 854), the national council very early developed a profound jealousy of the power and influence of the small and private council of state and court officials which the king associated with himself in the exercise of his great prerogatives. By every means it sought to control the ministers. Abandoning very soon, as revolutionary, all efforts to hold the king himself personally responsible for executive acts, Parliament early accepted the theory that the king could do no wrong; that breaches of law and of right committed by the government were committed always, — so the theory ran, — by the vicious advice of the king's personal advisers; they could do wrong (here the theory shaded off into fact), and they should be held responsible for all the wrong done. So early as the close of the twelfth century the Great Council deposed William Longchamp, Justiciar and Chancellor of Richard I., for abuse of power. During the fourteenth century Parliament claimed and once or twice exercised the right to appoint ministers and judges; it beheaded Edward II.'s Treasurer and imprisoned his Chancellor for their part in Edward's illegal acts; and at the close of the century (1386) it impeached Michael de la Pole, Richard II.'s minister, notwithstanding the fact that he was able to plead the king's direct commands in justification of what he had done. In the seventeenth century a new ground of impeachment was added. From that time out, ministers were held responsible, by the severe processes of trial by Parliament for high crimes and misdemeanors, not only for illegal, but also for bad advice to the Crown, for gross mistakes of policy as well as for overt breaches of law and of constitutional rights.

[1] H. D. Traill, *Central Government* (English Citizen Series), pp. 23–25.

859. **Disappearance of Impeachment.** — The Act of Settlement and the policy of William and Mary inaugurated, however, the final period of Parliament's supremacy. Parliament's preferences began to be regarded habitually in the choice of ministers, and impeachment, consequently, began gradually to fall into disuse. Its place was taken by parliamentary votes, — finally by votes of the House of Commons alone. Ministers who cannot command a majority in the House of Commons for the measures which they propose resign, and Parliament has its own way concerning the conduct of the government.

860. **The Executive.** — The Executive, under the English system, so far as it may be described at once briefly and correctly, may be said to consist, therefore, of the Sovereign and a Cabinet of ministers appointed with the Sovereign's formal consent. All real authority is with the Cabinet; though the ministers are, in law, only the Sovereign's advisers, and the government is conducted in the Sovereign's name. The true place of the Sovereign in the system is that of an honored and influential hereditary councillor, to whose advice an exalted title and a constant familiarity with the greater affairs of state lend a peculiar weight. The king[1] is in fact, though of course not in legal theory, a permanent minister, differing from the other ministers chiefly in not being responsible to Parliament for his acts, and on that account less powerful than they.

861. The Sovereign is not a member of the Cabinet because George I. could not speak English. Until the accession of George I. the king always attended Cabinet councils; George did not do so because he could not either understand or be understood in the discussions of the ministers. Since his time, therefore, the Sovereign has not sat with the Cabinet. A similar example of the interesting ease with which men of our race establish and observe precedents is to be found in the practice on the part of Presidents of the United States of sending written messages to Congress. Washington and John Adams addressed Congress in person on public affairs; but Jefferson, the third President, was not an easy speaker, and preferred to send a written message. Subsequent Presidents followed his example as of course. Hence a sacred rule of constitutional action!

[1] Since the throne of England is generally occupied by a man, it is most convenient to use 'king' as the distinctive title of the Sovereign in every general statement of constitutional principles.

862. **Position of the Cabinet.** — The Cabinet consists of the principal ministers of state and has reached its present position of power in the government because of its responsibility to Parliament. The chief interest of English constitutional history centres in the struggle of Parliament to establish its supremacy over all other authorities in the conduct of the government; that struggle issued in the last century in the complete triumph of Parliament; it has reached its farthest logical consequence in our own century in the concentration of parliamentary authority in the popular house of Parliament, the House of Commons. Parliament always claimed the right to direct in the name of the people, of the nation; that was the solid basis of all its pretensions; and so soon as reforms in the composition of the House of Commons had made it truly representative of the people, the House of Lords, which represents the hereditary, not the representative, principle, necessarily lost some part of its political authority. It is constantly recruited, by the creation of peerages, from all classes of successful men, scientists, manufacturers, lawyers, diplomatists, journalists, poets; but it is recruited by appointment, not by election; its votes are not controlled by the electorate; and precedence in affairs has fallen to the people's chamber.

863. **Appointment of the Cabinet Ministers.** — The responsibility of the ministers to Parliament constitutes their strength because it makes them the agents of Parliament: and the agents of a sovereign authority virtually share its sovereignty. The king appoints only such ministers as have the confidence of the House of Commons; and he does it in this way: he sends for the recognized leader of the political party which has the majority in the House of Commons and asks him to form a Cabinet. If this leader thinks that his party will approve of his assuming such a responsibility, he accepts the commission, and, usually after due consultation with other prominent members of his party, gives to the Sovereign a list of the men whom he recommends for appointment to the chief offices of state. These the Sovereign appoints and commissions as of course. They are always men chosen from among the members of both houses of Parliament, and generally because they have proved there their

ability to lead. They have, so to say, chosen themselves by a career of steady success in the debates of the Houses: they have come to the front by their own efforts, by force of their own ability, and usually represent tried parliamentary capacity. Such capacity is necessary for their success as ministers; for, after they have entered the Cabinet, they constitute, in effect, a committee of the majority of the House of Commons, commissioned to lead Parliament in debate and legislation, to keep it, — and, through it, the country at large, — informed concerning all important affairs of state which can prudently be made public, and to carry out in the conduct of the government the policy approved of by the representatives of the people.

864. **Composition of the Cabinet.** — The Cabinet does not consist invariably of the same number of minister. Eleven officials always have seats in it; namely, the First Lord of the Treasury, the Lord Chancellor, the Lord President of the Council, the Lord Privy Seal, the Chancellor of the Exchequer, the five Secretaries of State (for Home Affairs, for Foreign Affairs, for the Colonies, for India, and for War), and the First Lord of the Admiralty. To these are generally added from three to six others, according to circumstances: often, for instance, the President of the Board of Trade, generally of late the Chief Secretary for Ireland, frequently the President of the Local Government Board. The general rule which governs these additions is, that every interest which is likely to be prominent in the debates and proceedings of the House of Commons ought to have a Cabinet minister to speak for it and to offer to the House responsible advice. The word 'Ministry' is of wider meaning than the word 'Cabinet.' The 'Ministry' consists of all those executive officers who have seats in Parliament. These are the 'political' officers, who are expected to resign their offices when the Cabinet is defeated in the Commons. But not all of them are members of the Cabinet. The Cabinet of Lord Salisbury consists (1897) of nineteen persons; but besides these there are forty non-Cabinet ministers in Parliament. (Compare sec. 886.)

865. No member of the House of Commons may accept office without the approval of his constituents. Upon receiving an appointment as minister he must resign his seat in the House and seek reëlection, as representative *plus* minister. The whole matter is merely formal, however, in most cases. The opposite party do not usually, under such circumstances, contest the seat a second time, and the minister is reëlected without opposition.

866. The custom of the Sovereign's selecting only the chief minister and intrusting him with the formation of a ministry also, as well as the

Sovereign's absence from Cabinet meetings, originated with George I., who did not know enough of English public men to choose all the ministers, and so left the choice to Walpole.

867. This method of forming a ministry is the outcome of Parliament's efforts to hold the king's ministers to a strict responsibility to itself. None but members of their own party would suit the majority in Parliament as ministers; and since the ministers have to explain and excuse their policy to the Houses it is best that they should be members of the Houses with the full privileges of the floor. Only by such an arrangement could the full harmony desired between Parliament and the ministers be maintained: by face to face intercourse.

868. **Ministerial Responsibility.** — If the ministers are defeated on any important measure in the House of Commons, or if any vote of censure is passed upon them in that House, they must resign, — such is the command of precedent, — and another ministry must be formed which is in accord with the new majority. The ministers must resign together because the best form of responsibility for their conduct of the government can be secured only when their measures are taken in concert, and the House of Commons would be cheated of all real control of them if they could, upon each utterance of its condemnation of an executive act, or upon each rejection by it of a measure proposed or supported by them, 'throw overboard' only those of their number whose departments were most particularly affected by the vote, and so keep substantially the same body of men in office. If a defeated or censured ministry think that the House of Commons in its adverse vote has not really spoken the opinion of the constituencies, they can advise the Sovereign to dissolve the House and order a new election; that advice must be taken by the Sovereign; and the ministers stand or fall according to the disposition of the new House towards them.

869. It should be added that exceptional cases do sometimes arise in which responsibility for an objectionable course of action can be so plainly and directly fixed upon a particular minister, who has acted, it may be, without the concurrence, possibly without the knowledge, of his colleagues, that his separate dismissal from office is recognized as the only proper remedy. A notable instance of this sort arose in England in 1851,

when Lord Palmerston, then foreign secretary, was dismissed from office for adding to various other acts of too great independence an unauthorized expression of approval of the *coup d'état* of Louis Napoleon in France.

870. **Legal Status of the Cabinet.** — The peculiar historical origin of the Cabinet appears in a statement of its position before the law. As we have seen (sec. 856), it is not a body recognized by law: its existence, like the existence of not a few other political institutions in England, is only *customary*. The particular ministers who form the Cabinet have the legal right to be the exclusive advisers of the Crown, — that is, the sole executive power, — only by virtue of their membership of the Privy Council. They must all be sworn into the membership of that body before they can act as confidential servants of the Sovereign. The Privy Council itself, however (as a whole, that is), has not been asked for political advice for two centuries. It takes no part whatever in the function which twelve or fifteen ministers exercise by virtue of belonging to it; it is not responsible for the advice they give; and it cannot in any way control that advice. Membership of the Privy Council, moreover, is for life. The leaders of the minority in the Commons, having themselves once been ministers, are still members of the Council and have still the same *legal* right to advise the Crown.

871. **Initiative of the Cabinet in Legislation.** — Having inherited the right of initiative in legislation which once belonged to the Crown, the Cabinet shape and direct the business of the Houses. Most of the time of Parliament is occupied by the consideration of measures which they have prepared and introduced; at every step in the procedure of the Houses it is the duty of the ministers to guide and facilitate business.

872. **The Prime Minister.** — "Consistency in policy and vigor in administration" on the part of the Cabinet are obtained by its organization under the authority of one 'First' Minister. This Prime Minister generally holds the office of First Lord of the Treasury, though it is within his choice to hold another, if he will. It is not the office which gives him primacy in the Cabinet, but his recognized weight as leader of his party. The leader chosen by the Sovereign to form the ministry stands at its head when formed. He usually chooses to occupy the office of First Lord of the Treasury because the official duties of that place are nominal only and leave him free to exercise his important functions as leader of the party in power.

873. **The Departments of Administration.** — So much for the relations of the Cabinet to the Sovereign and to Parliament. When we turn to view it in its administrative and governing capacity as

the English Executive, we see the ministers as heads of departments, as in other governments. But the departments of the central government in England are by no means susceptible of brief and simple description as are those of other countries, which have been given their present forms by logical and self-consistent written constitutions, or by the systematizing initiative of absolute monarchs. They hide a thousand intricacies born of that composite development so characteristic of English institutions.

874. **The Five Great 'Offices' of State.** — Not attempting detail, however, it is possible to give a tolerably clear outline of the central administration of the kingdom in comparatively few words. The Treasury I shall describe in a separate paragraph (sec. 879). The *Home Office* superintends the constabulary; oversees, to a limited extent, the local magistracy and the administration of prisons; advises the Sovereign with reference to the granting of pardons; and is the instrument of Parliament in carrying out certain statutes restricting at some points the employment of labor. The *Foreign Office* describes itself. So do also, sufficiently, the *Colonial Office*, the *War Office*, and the *India Office*.

875. These five great 'Offices' are all, historically considered, in a certain sense offshoots from a single office, that of the king's Principal Secretary of State. By one of the usual processes of English constitutional development, an officer bearing this title very early came into existence as one of the most trusted ministers of the Crown. At first only a specially confided-in servant of the Sovereign, employed in all sorts of confidential missions, he gradually assumed a more regular official place and began to absorb various important functions. At length it became necessary to double him and to have two Principal Secretaries of State, two men theoretically sharing one and the same office, and alternates of each other. At last he has, for the sake of convenience, been *quintupled*. There are five Principal Secretaries of State, all, in theory, holding the same office, and each, in theory, legally authorized to perform the functions of any or all of the others; but in fact, of course, keeping each to a distinct department. There is a Principal Secretary of State for the Home Department, a Principal Secretary of State for Foreign Affairs, a Principal Secretary of State for the Colonies, a Principal Secretary of State for War, and a Principal Secretary of State for India. It is an interesting and characteristic case of evolution.

876. **The Admiralty, the Board of Trade, and the Local Government Board.** — The Admiralty is the naval office. It is presided

over by a Commission of six, consisting of a chairman, entitled First Lord of the Admiralty, and five Junior Lords. *The Board of Trade* is, in form, a committee of the Privy Council. It is reconstituted at the opening of each reign by an order in Council. It consists, nominally, of "a President and certain *ex officio* members, including the First Lord of the Treasury, the Chancellor of the Exchequer, the Principal Secretaries of State, the Speaker of the House of Commons, and the Archbishop of Canterbury."[1] But it has long since lost all vital connection with the Privy Council and all the forms even of board action. Its President is now practically itself. Its duties and privileges are both extensive and important. It advises the other departments concerning all commercial matters, and is the statistical bureau of the kingdom; it exercises the state oversight of railways, inspects passenger steamers and merchant vessels, examines and commissions masters and mates for the merchant marine, administers the statutes concerning harbors, lighthouses, and pilotage, provides standard weights and measures, superintends the coinage, and supervises the Post Office. *The Local Government Board*, which is also in form a committee of the Privy Council, has also in reality none of the characteristics either of a committee or of a board. It is a separate and quite independent department, under the control of a President. Its other, nominal, members, the Lord President of the Council, the five Principal Secretaries of State, the Lord Privy Seal, and the Chancellor of the Exchequer, in reality take no part in its management. It is, in effect, the English department of the Interior. It is charged with supervising the administration, by the local authorities of the kingdom, "of the laws relating to the public health, the relief of the poor, and local government," — duties more important to the daily good government of the country than those of any other department. It also specially examines and reports upon every private bill affecting private interests.

877. **The Board of Agriculture.** — In 1889 still another department was set up which was to be in form a Board but in fact in charge of a single minister, its President. Since 1883 there had been a Committee of the Privy Council charged with the special superintendence of the agri-

[1] Traill, pp. 126, 127.

cultural interests of the kingdom; in 1889 it was given a more definite organization and larger powers, under the name of The Board of Agriculture, — a Board to consist nominally of the Lord President of the Council, the five Principal Secretaries of State, the First Commissioner of the Treasury, the Chancellor of the Exchequer, the Chancellor of the Duchy of Lancaster, and the Secretary for Scotland; but really to be under the direction of none of these gentlemen, but of its own independent President. The duties of the Board embrace, besides the collection and publication of all information likely to be serviceable to the agricultural interest and the conduct and encouragement of inquiries and investigations touching agricultural processes and conditions and concerning the culture of forests, the inspection and subvention of schools in which instruction is given in such subjects, the duties hitherto attaching to the offices of the Land Commissioners and of the Commissioners of Works and Public Buildings, the enforcement of the acts concerning contagious diseases among animals, and a miscellany of duties of like kinds.

878. **The Post Office** is in England a subdivision of the Board of Trade. At its head is a Postmaster General. It controls, besides the usual business of a post-office department, the telegraph system of the country, which is owned by the government; and it has also under its direction a useful postal savings-bank system.

879. **The Treasury.** — The history of this department, which may be reckoned the most important, may serve as another typical example of English departmental evolution. Originally the chief financial minister of the Crown was the Lord High Treasurer, with whom was associated at an early date a Chancellor of the Exchequer. But in the reign of George I. the great office of Lord High Treasurer was, in English phrase, put permanently 'into commission': its duties, that is, were intrusted to a board instead of to a single individual. This board was known as the "Lords Commissioners for executing the office of Lord High Treasurer," and consisted of a First Lord of the Treasury, the Chancellor of the Exchequer, and three others known as Junior Lords. Evolution speedily set in, as in other similar English boards. That is, the board ceased to act as a board. Its functions became concentrated in the hands of the Chancellor of the Exchequer; the First Lordship, occupied almost invariably since 1762 by the Prime Minister, gradually lost all connection, except that of honorary chairmanship, with the Treasury Commission, its occupant giving all his energies to his political functions (sec.

872); and the Junior Lords were left none but parliamentary duties.

880. **The Chancellor of the Exchequer,** therefore, is the working head of the Treasury Department, and as such plays one of the most conspicuous and important rôles in the government of the country. He controls the revenue and expenditure of the state, submitting to Parliament, in the form of an annual 'budget,' careful comparisons of the sums needed for the public service and of the sums that may be expected to accrue from existing or possible sources of revenue, together with proposals to extend or curtail taxation, according as there is prospect of a deficit or of a surplus under existing arrangements.

881. **The Estimates.** — The various departments make up their own estimates; but these are subjected to a careful examination by the Chancellor of the Exchequer, and with him rests the prerogative of revising them where they may seem to admit of or to require revision. Thus changes in the clerical forces of the departments or redistributions of their work among sub-departments, etc., cannot, if they involve additional expense, be made without express approval by the Treasury.

882. Mr. Gladstone twice, with characteristic energy, held, when Prime Minister, both the office of First Lord of the Treasury and the office of Chancellor of the Exchequer, thus in effect once more bringing the First Lord into vital connection with his nominal department.

883. **Administrative Departments of the Privy Council.** — Though superseded as advisory council to the Crown by the Cabinet and deprived of all actual executive control by the virtual erection of its several boards into independent departments, the Privy Council still has one or two vital parts. Chief among these is *The Education Department*, which consists of the Lord President of the Council, as nominal chief, a Vice-President as working chief, and certain *ex officio* members, among them the Chancellor of the Exchequer and the Secretary of State for Home Affairs, and which is charged with the administration of the public educational system of the country. This committee preserves in a rather more than formal way its collegiate character. The important judicial duties of the Privy Council I shall speak of in another connection (sec. 924).

884. **The Lord Privy Seal** exercises no important functions except those of keeping the great Seal of State and affixing it to such public

documents as need its formal attestation; but the office is a 'Cabinet office.' The lightness of its duties leaves its incumbent the freer for his Cabinet functions of counsel. It is a berth for elderly men of intellectual and political weight who cannot or will not undertake onerous official duties.

885. **The Chancellor of the Duchy of Lancaster** holds an office whose duties (entirely legal and local) have all been delegated by long-standing custom to a Vice-Chancellor; but eminent politicians are brought into the Cabinet through this sinecure Chancellorship in order that they may give the ministry the benefit of their advice and countenance.

886. **Political Under Secretaries.** — There are often associated with the principal ministers of state certain 'political' Under Secretaries, whose function is one of very considerable importance. A political Under Secretary is one who goes in or out of office with his party, not having a place in the Cabinet but sharing its fortunes in the Commons. He is parliamentary spokesman for his chief. If the foreign minister, for instance, or any other member of the Cabinet, the affairs of whose department may be expected to call forth frequent comment or question in the lower House, be a member of the House of Lords, he is represented in the Commons by an Under Secretary, who there speaks as the minister's proxy. The representation of the ministers in both Houses is thus secured. (Compare sec. 864.)

887. **Administration of Scotland and Ireland.** — The affairs of Scotland are cared for through the agency of a Lord Advocate for Scotland, who is the legal adviser of the government concerning Scotch interests, and a Secretary for Scotland who is the intermediary between the Scotch members of Parliament and the ministry, and the official spokesman of the ministers regarding Scotch business in the House of Commons. Officially the Lord Advocate ranks as a subordinate of the Secretary of State for Home Affairs. The Irish executive is, formally at least, separate from the English, being vested in a Lord Lieutenant and a Privy Council; but in fact it is completely controlled by the English Cabinet though the *Chief Secretary to the Lord Lieutenant*, who is always a member of the House of Commons and, when Irish affairs are specially prominent, a member of the Cabinet also; and who, though in titular rank a subordinate of the Lord Lieutenant, is, by virtue of his relations to the Cabinet and to Parliament, in effect his master.

888. **The Lord Chancellor**, the only regular member of the Cabinet whose duties I have not yet indicated, is a judicial and legislative officer. His functions will be mentioned in another connection (sec. 925).

889. **The Cabinet as Executive.** — It would be a great mistake to suppose that, because the Cabinet is in reality a committee of the House of Commons, drawing all its authority from the confidence reposed in it by that chamber, it is a *mere* committee, possessing no separate importance as the executive body of the kingdom. In a sense the ministers have inherited the ancient prerogatives of the Crown; and Parliament is, in a very sensible degree, dependent upon them for the efficacy of the part it is to play in governing. Almost all important legislation waits for their initiative, and the whole business of the Houses to a great extent depends upon them for its progress. They can make treaties, of whatever importance, with foreign countries; they can shape the policy of the mother country towards her colonies; they can take what serious steps they please with reference to the government of India, can place troops and naval forces at pleasure, can make a score of momentous moves of policy towards the English dependencies and towards foreign countries, — in the field, that is, of many of the largest interests of the Empire, — which may commit the country to the gravest courses of action; — and all without any *previous* consultation with Parliament, whom they serve. The House of Commons, in brief, can punish but cannot prevent them.

890. **Parliament: I. the House of Commons; its Original Character.** — "The Parliament of the nineteenth century is, in ordinary speech, the House of Commons. When a minister consults Parliament he consults the House of Commons; when the Queen dissolves Parliament she dissolves the House of Commons. A new Parliament is merely a new House of Commons."[1] Such has been the evolution of English politics. But the processes which worked out this result were almost five centuries long. During a very long period, Parliament's first and formative period, the Commons held a position of distinct and natural subordination to the Lords, lay and spiritual; the great constitutional rôles were played by the king and baronage. The commoners in Parliament represented the towns, and spoke, for the most part, at first, only concerning the taxes they would give.

[1] Spencer Walpole, *The Electorate and the Legislature* (English Citizen Series), p. 48.

When the house of Parliament called the House of Commons first assumed a distinct separate existence, about the middle of the fourteenth century (sec. 852), it was by no means a homogeneous body. It held both the knights of the shires and the burgesses of the towns; and it was a very long time before the knights forgot the doubt which had at first been felt as to which house they should sit with, Lords or Commons. They were men of consideration in their counties; the only thing in common between them and the men from the towns was that election, and not hereditary possessions or rank, was the ground of their presence in Parliament. Long use, however, finally obscured such differences between the two groups of members in the lower House; their interests were soon felt to be common interests, because the chief questions they had a real voice in deciding were questions of taxation, which touched all alike.

891. **Historical Contrasts between County and Borough Representatives.** — The main object of the Crown in making the Commons as representative as possible would seem to have been to bring the whole nation, as nearly as might be, into coöperation in support of the king's government: and at first the lower House was a truly representative body. The knights of the shires were elected "in the county court, by the common assent of the whole country"; the burgesses of the towns were chosen by the borough freemen, a body numerous or limited according to the charter of each individual town, but generally sufficiently broad to include the better class of citizens. It was the decay of the towns and the narrowing of their franchises which made the Commons of the closing decades of the last century and the first decades of our own the scandalously subservient, unrepresentative Commons which drove the American colonies into revolt. So early as the reign of Henry VI., in the first half, that is, of the fifteenth century, the franchise was limited in the counties to freeholders whose landed property was of an annual value of forty shillings, and forty shilling freeholders were then men of means;[1] but this franchise remained unchanged until the parliamentary reforms of

[1] Forty shillings, it is estimated, were equivalent at that time in purchasing value to eighty pounds at present ($400). See J. E. T. Rogers, *Economic Interpretation of History*, p. 32.

the present century, and tended steadily, with the advancing wealth of the country and the relative decrease in the value of the shilling, to become more inclusive and more liberal. The borough franchise, on the contrary, went all the time steadily from bad to worse. It became more and more restricted, and the towns which sent representatives to Parliament became, partly by reason of their own decay, partly by reason of the growth and new distribution of population in the kingdom, less and less fitted or entitled to represent urban England. New boroughs had been given representatives from time to time; but all efforts to redistribute representation had virtually ceased before the dawn of the period of that great increase of population and that immense development of wealth and industry which has made modern England what it is. The towns which returned members to the House of Commons were mostly in the southern counties where the old centres of population had been. Gradually they had lost importance as the weight of the nation shifted to the central and western counties and Liverpool, Manchester, and Birmingham grew up, — and not their importance only, but their inhabitants as well. Some fell into ruins and merged in neighboring properties, whose owners pocketed both them and their parliamentary franchise; others, which did not so literally decay, became equally subject to the influence of neighbor magnates upon whom the voters felt more or less dependent; and at last the majority of seats in the Commons were virtually owned by the landed classes represented in the House of Lords.

892. The House of Commons consisted in 1801 of 658 members, and of these 425 are said to have been returned "on the nomination or on the recommendation of 252 patrons." It is said, also, that "309 out of the 513 members belonging to England and Wales owed their election to the nomination either of the Treasury or of 162 powerful individuals." [1]

893. **Geographical Relations of Boroughs and Counties.** — Borough populations had no part in the election of county members. The counties represented in Parliament were rural areas, exclusive of the towns. Thus the county of Derby was, for the purposes of parliamentary representation, the county of Derby *minus* its boroughs.

[1] Walpole, p. 55.

894. **Parliamentary Reform.** — It was to remedy this state of things that the well-known reforms of the present century were undertaken. Those reforms have made the House of Commons truly representative and national: and in making it national have made it dominant. In 1832 a wholesale redistribution of seats was accomplished, and a complete reformation of the franchise. The decayed towns were deprived of their members, and the new centres of population were accorded adequate representation. The right to vote in the counties was extended from those who owned freeholds to those who held property on lease and those who held copyhold estates,[1] and to tenants whose holdings were of the clear annual value of fifty pounds. The borough franchise was put upon the uniform basis of householders whose houses were worth not less than ten pounds a year. This was putting representation into the hands of the middle, well-to-do classes; and with them it remained until 1867. In 1867 another redistribution of seats was effected, which increased the number of Scotch members from fifty-four to sixty and made other important readjustments of representation. The franchise was at the same time very greatly widened. In the boroughs all householders and every lodger whose lodgings cost him ten pounds annually were given the right to vote; and in the counties, besides every forty shilling freeholder, every copyholder and leaseholder whose holding was of the annual value of five pounds, and every householder whose rent was not less than twelve pounds a year. Thus representation stood for almost twenty years. Finally, in 1884, the basis of the present franchise was laid. The qualifications for voters in the counties were made the same as the qualifications fixed for borough electors by the law of 1867, and over two millions and a half of voters were thus added to the active citizenship of the country. There is now a uniform 'household and lodger franchise' throughout the kingdom.

895. 'Occupier' is used in England as synonymous with the word lodger. The 'occupation' requisite for the exercise of the franchise must be of a "clear annual value of £10." Occupation "by virtue of any

[1] Copyhold estates are estates held by the custom of the manor in which they lie, a custom once evidenced by a 'copy' of the rolls of the Manor Court.

office, service, or employment" is considered, for the purpose of the franchise, equivalent to occupation for which rent is paid, if the rent *would* come to the required amount, if charged.

896. In 1885 another great *Redistribution Act* was passed, which merged eighty-one English, two Scotch, and twenty-two Irish boroughs in the counties in which they lie, for purposes of representation; gave additional members to fourteen English, three Scotch, and two Irish boroughs; and created thirty-three new urban constituencies. The greater towns which returned several members were cut up into single-member districts, and a like arrangement was effected in the counties, which were divided into electoral districts to each of which a single representative was assigned.[1] These changes were accompanied by an increase of twelve in the total number of members. Through the redistribution of seats in 1832 and 1867 the number had remained 658; it is now 670.

897. **Multiple Voting.** — It is the peculiar feature of the English law governing the franchise that individual voters who have the requisite amount of property or interest in more than one constituency are entitled to vote for members of the House in as many parliamentary districts as they hold the necessary amount of property in; and, inasmuch as the elections are not held everywhere upon the same day, it is possible for one man to vote in several places, for as many several members.

898. The following is an analysis of the present membership of the House of Commons given in the Statesman's Year Book for 1897:[2] the English counties return 253 members, the English boroughs 237, the English Universities 5; Scotch counties 39, boroughs 31, universities 2; Irish counties 85, boroughs 16, universities 2. Totals: counties 377, boroughs 284, universities 9.

899. One unusual feature of the reforms of 1884–1885 was that they applied to Scotland and Ireland as well as to England and Wales. Earlier Acts had applied only to England and Wales, special Acts governing the franchise and representation in Ireland and Scotland. The Irish delegation in the House of Commons is now for the first time truly representative of the Irish people.

900. The legislation of 1885, by dividing the greater towns into single-member constituencies, abolished the 'three-cornered constituencies'

[1] This was establishing what the French, as we have seen (sec. 402), would call *scrutin d'arrondissement.*

[2] Where other data also will be found.

which had been devised in 1867 for purposes of minority representation. Voters in places which returned more than two members had been allowed one vote less apiece in parliamentary elections than the number of members to be chosen. Thus, if any place returned four members, for example, each voter was entitled to vote for three and no more: it being hoped that the minority would by proper management under this plan be able to elect one out of the four. The plan was not found to work well in practice, and has accordingly been abandoned.

901. **Election and Term of the Commons.** — Members of the House of Commons are elected, by secret ballot, for a term of seven years. Any full citizen is eligible for election except priests and deacons of the Church of England, ministers of the Church of Scotland, Roman Catholic priests, and sheriffs and other returning officers, — and except, also, English and Scotch peers. Irish peers not elected to the Lords are eligible and have often sat in the House.[1] The persons thus excepted, — all save the peers, at least, — can neither sit nor vote.

902. As a matter of fact no House of Commons has ever lived its full term of seven years. A dissolution, for the purpose of a fresh appeal to the constituencies, has always cut it off before its statutory time. The average duration of Parliaments has been less than four years. The longest Parliament of the present century (elected in 1820) lived six years, one month, and twelve days.

903. The use of the secret ballot does not rest upon any permanent statute. In 1872 its use was voted for one year; and ever since the provision has been annually renewed.

904. There is no property qualification for election to the House now, as there was formerly; but the members receive no pay for their services; and, unless their constituents undertake to support them, — as was done in the early history of Parliament, and has been done again in some recent instances, — this fact constitutes a virtual income qualification.

905. **Summons, Electoral Writ, Prorogation.** — No standing statutes govern the time for electing Parliaments. Parliament assembles upon summons from the Crown (which, like all other acts of the Sovereign, now really emanates from the ministers); and the time for electing members is set by writs addressed to the sheriffs, as of old (sec. 848). Parliament is also 'prorogued' (adjourned for the session), by the Sovereign (that is,

[1] Lord Palmerston, for example, was an Irish peer.

the Cabinet); and assembles again, after recess, by special summons.

906. The summons for a new Parliament must be issued at least thirty-five days before the day set for its assembling; the summons to a prorogued Parliament at least fourteen days beforehand. It is now the invariable custom to assemble Parliament once every year about the middle of February, and to keep it in session from that time till about the middle of August.

907. If a seat fall vacant during a session, a writ is issued for an election to fill it upon motion of the House itself; if a vacancy occur during a recess, the writ is issued at the instance of the Speaker of the House.

908. Since 1867 the duration of Parliament has not been liable to be affected by a demise of the Crown; before 1695 Parliament died with the monarch. In that year it was enacted that Parliament should last for six months after the demise of the Crown, if not sooner dissolved by the new Sovereign. Parliament, it is now provided, must assemble immediately upon the death of the Sovereign. If the Sovereign's death take place after a dissolution and before the day fixed for the convening of the new Parliament, the old Parliament is to come together for six months, if necessary, but for no longer term.

909. **Organization of the House.** — The Commons elect their own Speaker (Spokesman); their clerk and sergeant-at-arms are appointed by the Crown. The business of the House is, as we have seen (sec. 871), quite absolutely under the direction of its great committee, the Cabinet. Certain days of the week are set apart by the rules for the consideration of measures introduced by private members, but most of the time of the House is devoted to 'government bills.' The majority put themselves in the hands of their party leaders, the ministers, and the great contests of the session are between the minority on one side of the chamber and the ministerial party, or majority on the other side.

910. Down the centre of the hall in which the House sits runs a very broad aisle. The Speaker's seat stands, upon an elevated place, at the farther end of this aisle, and below it are the seats and tables of the clerks and a great table stretching some distance down the aisle, for the reception of the Sergeant's mace and various books, petition boxes, and papers. The benches on either side of the aisle face each other. Those which rise, in tiers, to the Speaker's right are occupied by the majority, the Cabinet ministers, their leaders, sitting on the front bench by the great table.

This front bench is accordingly called the 'Treasury Bench,' — the Treasury being the leading Cabinet office. On the benches which rise to the Speaker's left sit the minority, their leaders also (the 'leaders of the Opposition,' — the minority being expected, generally with reason, to be opposed to all ministerial proposals) on the front bench by the table, and so directly facing the ministers, only the table intervening.

911. **II. The House of Lords: its Composition.** — The House of Lords consisted during the session of 1896 of four hundred and ninety-six English hereditary peers (Dukes, Marquises, Earls, Viscounts, Barons); the two archbishops and twenty-four bishops, holding their seats by virtue of their offices; sixteen Scottish representative peers, elected by the whole body of Scottish peers to sit for the term of Parliament; twenty-eight Irish peers, elected by the peers of Ireland to sit for life; and four judicial members known as Lords of Appeal in Ordinary (secs. 915, 923, 924), sitting as life-peers only, by virtue of their office.

912. There is no necessary limitation to the number of hereditary English peers. Peers can be created at will by the Crown (that is, by the ministry), and their creation is in fact frequent. Two-thirds of the present number of peers hold peerages created in the present century. Thirteen were created in the year 1886. The number of Scottish and Irish peers is limited by statute.

913. The House of Lords is summoned to its sessions when the House of Commons is, and the two must always be summoned together.

914. **Function of the House of Lords in Legislation.** — The House of Lords is, in legal theory, coequal in all respects with the House of Commons; but, in fact, its authority is, as I have already more than once said (secs. 859, 868, 890), politically very inferior. Its consent is, in law, as necessary as that of the House of Commons to every act of legislation; but it does not often withhold that consent when the House of Commons speaks emphatically and with the apparent concurrence of the nation on any matter: it then regards it as a matter of imperative policy to acquiesce. Its legislative function has been well summed up as a function of cautious revision. It can wisely and safely stand fast against the Commons only when there is some doubt as to the will of the people. Its acquiescence, however, is based usually upon just views of policy rather than upon

mere timidity, and its part in the quieter sorts of law-making is still very influential.

915. **The House of Lords as a Supreme Court.** — The House of Lords is still, however, in fact as well as in form, the supreme court of appeal in England, though it has long since ceased to exercise its judicial functions (inherited from the Great Council of Norman times) as a body. Those functions are now always exercised by the Lord Chancellor, who is *ex officio* president of the House of Lords, and four Lords of Appeal in Ordinary, who are learned judges appointed as life peers, specially to perform this duty. These special 'Law Lords' are assisted from time to time by other lords who have served as judges of the higher courts or who are specially learned in the law.

916. **Legislation**, therefore, is controlled by the House of Commons, the interpretation of the law by the judicial members of the House of Lords. The House of Lords shares with the popular chamber the right of law-making, but cannot assert that right in the face of a pronounced public opinion. The Sovereign, in like manner, has theoretically the right to negative legislation; but the Sovereign is in the hands of the ministers, and the ministers are in the hands of the Commons; and legislation is never negatived.

917. **The Constitution of England** consists of law and precedent. She has great documents like Magna Charta at the foundation of her institutions; but Magna Charta was only a royal ordinance. She has great laws like the Bill of Rights at the centre of her political system; but the Bill of Rights was only an act of Parliament. She has no written constitution, and Parliament may, in theory, change the whole structure and principle of her institutions by mere Bill. But in fact Parliament dare not go faster than public opinion: and public opinion in England is steadily and powerfully conservative.

918. That is a very impressive tribute which Sir Erskine May pays to the conservatism of a people living under such a form of government when he says, "Not a measure has been forced upon Parliament which the calm judgment of a later time has not since approved; not an agitation has failed which posterity has not condemned."[1]

[1] *Constitutional History*, Vol. II., p. 243 (Am. ed., 1863).

919. **The Courts of Law.** — The administration of justice has always been greatly centralized in England. From a very early day judges of the king's court have 'gone on circuit,' holding their assizes (sittings) in various parts of the country, in order to save suitors the vexation and expense of haling their adversaries always before the courts in London. But these circuit judges travelled from place to place under special commissions from the central authorities of the state, and had no permanent connections with the counties in which their assizes were held: they came out from London, were controlled from London, and, their circuit work done, returned to London. It was, moreover, generally only the three courts of Common Law (the Court of King's Bench, the Court of Common Pleas, and the Court of Exchequer) that sent their judges on circuit; the great, overshadowing Court of Chancery, which arrogated so wide a jurisdiction to itself, drew all its suitors to its own chambers in Westminster. The only thing lacking to perfect the centralization was a greater uniformity of organization and a less haphazard distribution of jurisdiction among the various courts. This lack was supplied by a great Judicature Act passed in 1873. By that Act (which went into force on the 1st November, 1875), and subsequent additional legislation extending to 1879, the courts of law, which had grown, as we have seen (sec. 847), out of that once single body, the ancient Permanent Council of the Norman and Plantagenet kings, were at last reintegrated, made up together into a coördinated whole.

920. **Judicial Reform: the Reorganization of 1873–1879.** — These measures of reorganization and unification had been preceded, in 1846, by a certain degree of decentralization. Certain so-called County Courts were then created, which are local, not peripatetic Westminster, tribunals, and which have to a considerable extent absorbed the assize business, though their function, theoretically, is only to assist, not to supplant, the assizes. Now, therefore, the general outlines of the judicial system are these. The general courts of the kingdom are combined under the name, Supreme Court of Judicature. This court is divided into two parts, which are really two quite distinct courts: namely, the High Court of Justice and the Court of Appeal; while over both, as the court of

last resort, still stands the House of Lords. The High Court of Justice acts in three divisions, a Chancery Division, a Queen's Bench Division, and a Probate, Divorce, and Admiralty Division; and these three divisions constitute the ordinary courts of law, inheriting the jurisdictions suggested by their names. From them an appeal lies to the Court of Appeal; from the Court of Appeal to the House of Lords. The County Courts stand related to the system as the Assizes do.

921. "**The Chancery Division** has five judges besides its president, the Chancellor; the Queen's Bench Division has fifteen judges, of whom one, the Lord Chief Justice, is its president; the Probate, Divorce, and Admiralty Division has but two judges, of whom one presides over the other."[1] This arrangement into divisions is a mere matter of convenience; no very strict distinctions as to jurisdiction are preserved; and any changes that the judges think desirable may be made by an Order in Council. Thus an Exchequer Division and a Common Pleas division, which at first existed, in preservation of the old lines of organization, were abolished by such an Order in December, 1880. The judges assigned to the various Divisions do not necessarily or often sit together. Cases are generally heard before only one judge; so that the High Court may be said to have the effective capacity of twenty-three courts, its total number of judges being twenty-three. Only when hearing appeals from inferior tribunals, or discharging some other function different from the ordinary trial of cases, must two or more judges sit together.

922. **The Court of Appeals** may hear appeals on questions both of law and of fact. It consists of the Master of the Rolls and five Lords Justices, who may be said to constitute its permanent and separate bench, and of the presidents of the three Divisions of the High Court, who may be called its occasional members. Three judges are necessary to exercise its powers, and, in practice, its six permanent members divide the work, holding the court in two independent sections.

923. **The House of Lords** may sit, when acting as a court, when Parliament is not in session, after a prorogation, that is, or even after a dissolution: for the House of Lords when sitting as a court is like its legislative self only in its modes of procedure. In all other respects it is totally unlike the body which obeys the House of Commons in law-making. It is constituted always, as a court, of the Lord Chancellor and at least two of the Lords of Appeal in Ordinary of whom I have spoken (sec. 911); only sometimes are there added to these a third Lord of Appeal in Ordinary, an ex-Lord Chancellor, or one or more of such judges or ex-judges

[1] F. W. Maitland, *Justice and Police* (English Citizen Series), pp. 43, 44.

of the higher courts as may have found their way to peerages. Other members of the House never attend; or, attending, never vote.

924. **A Judicial Committee of the Privy Council,** of which also the Lord Chancellor is a member, and which now consists mainly of the same Lords of Appeal in Ordinary who act in judicial matters as the House of Lords, constitutes a court of last resort for India, the Colonies, the Channel Islands, and the Isle of Man, as well as, within certain limits, as a court of appeal from the Probate, Divorce, and Admiralty Division of the High Court of Justice.

925. **The Lord Chancellor** is the most notable officer in the whole system. He is president of the House of Lords, of the Court of Appeal, of the High Court of Justice, and of the Chancery Division of the High Court, and he is a member of the Judicial Committee of the Privy Council; and he actually sits in all of these except the High Court, — in the House of Lords and the Privy Council always, in the Court of Appeal often. More singular still, he is the political officer of the law: he is a member always of the Cabinet, and, like the other members, belongs to a party, and goes in or out of office according to the favor of the House of Commons, exercising while in office, in some sense, the functions of a Minister of Civil Justice.[1]

926. **Civil Cases** are heard either by judges of the High Court in London, by judges of that court sitting on circuit in the various 'assize towns' of the county, of which there is always at least one for each county, or by the County Courts created in 1846, which differ from the old county courts, long since decayed and now deprived of all judicial functions, both in their organization and in their duties. They consist, not of the sheriff and all the freemen of the shire, but of single judges, holding their offices during good behavior, assisted by permanent ministerial officers, and exercising their jurisdiction not over counties but in districts much smaller than the counties. They are called county courts only by way of preserving an ancient and respected name.

927. **The County Courts** have jurisdiction in all cases of debt or damage where the sum claimed does not exceed £50, and in certain equity cases where not more than £500 is involved, — except that cases of slander, libel, seduction, and breach of promise to marry, as well as all matrimonial cases, are withheld from them. At least, such is their jurisdiction in rough outline. A full account would involve many details; for it has been the tendency of all recent judicial legislation in England to give more and more

[1] Maitland, p. 68.

business, even of the more important kind, to these Courts. Their normal importance may be judged from the fact, stated by Mr. Maitland, that "most of the contentious litigation in England is about smaller sums than" £50.

928. A judge of the High Court may send down to a county court, upon the application of either party, cases of contract in which the sum claimed does not exceed £100. Any case, however small the pecuniary claim involved, may be removed from the county to the High Court if the judge of the county court will certify that important principles of law are likely to arise in it, or if the High Court or any judge thereof deems it desirable that it should be removed. Appeals from a county court to the High Court are forbidden in most cases in which less than £20 is involved.

929. The county court system rests upon the basis of a division of the country into fifty-six circuits. All but one or two of these include several 'districts' — the districts numbering about 500. Each district has its own separate court, with its own offices, registrar, etc.; but the judges are appointed for the circuits, — one for each circuit. They are appointed by the Lord Chancellor from barristers of seven years' standing.[1]

930. **Juries** are falling more and more into disuse in England in civil cases. In all the more important causes, outside the Chancery Division, whose rule of action, like that of the old Chancery Court, is 'no jury,' a jury may be impanelled at the desire of either party; but many litigants now prefer to do without, — especially in the County Courts, where both the facts and the law are in a large majority of the cases passed upon by the judge alone, without the assistance of the jury of five which might in these courts be summoned in all cases of above £20 value.

931. **Criminal Cases** are tried either before the county Justices of the Peace, who are unpaid officers appointed by the Chancellor upon the recommendation of the Lords Lieutenant of the Counties; before borough Justices, who are paid judges much like all others; or before judges of the High Court on circuit. The jurisdiction of the Justices may be said to include all but the gravest offences, all but those, namely, which are punishable by death or by penal servitude, and except, also, perjury, forgery, bribery, and libel. There are many Justices for each county, there being no legal limit to their number; and they exercise their more important functions at general Quarter Sessions, at general sessions, that is, held four times yearly. The criminal assizes of the High Court also are held four times a year. All

[1] The various Acts affecting the County Courts were amended and consolidated by the County Courts Act, 1888.

criminal cases, except those of the pettiest character, such as police cases, are tried before juries.

932. "About one-half of the criminal trials," it is stated,[1] "take place at county sessions, about one-fourth at borough sessions, the rest at Assizes or the Central Criminal Court," the great criminal court of London.

933. **Quarter and Petty Sessions.** — For the exercise of all their more important judicial functions the Justices meet quarterly, in Quarter Sessions; but for minor duties in which it is not necessary for more than two Justices to join, there are numerous Petty Sessions held at various points in the counties. Each county is divided by its Quarter Sessions into *petty sessional districts*, and every neighborhood is given thus its own court of Petty Sessions, — from which in almost all cases an appeal lies to Quarter Sessions. Thus the important function of licensing (sec. 966) is exercised by Petty Sessions, subject to appeal to the whole bench of Justices.

934. **The Justices of the Peace** were, as we shall see more particularly in another connection (secs. 946–950), the general governmental authorities of the counties until the reform of local government effected in 1888, exercising functions of the most various, multifarious, and influential sort. They are generally country gentlemen of high standing in their counties, and serve, as already stated, without pay. They are appointed, practically, for life. The 'Commission of the Peace,' — the commissioning, that is, of Justices of the Peace, — originated in the fourteenth century, and has had a long history of interesting development. Considering the somewhat autocratic nature of the office of Justice, it has been, on the whole, exercised with great wisdom and public spirit, and during most periods with extraordinary moderation, industry, and effectiveness.

935. The duties which Americans associate with the office of Justice of the Peace are exercised in England, not by the bench of Justices sitting in Quarter Sessions, — they then constitute, as we have seen, a criminal court of very extensive jurisdiction, — but by the Justices singly, sitting either formally or informally. A single Justice may conduct the preliminary examination of a person charged with crime, and may commit for trial if reasonable ground of suspicion be proved. A single Justice can also issue search warrants to the constabulary for the detection of crime, etc.

936. **Police.** — The police force, or, in more English phrase, the constabulary, of the kingdom is overseen from London by the Home Office, which makes all general rules as to discipline, pay, etc., appoints royal inspectors, and determines, under the Treasury, the amount of state aid to be given to the support of the

[1] Maitland, p. 86.

forces; but all the actual administration of the system is undertaken by the local authorities. In the Counties a joint Committee of Quarter Sessions and the County Council appoint the Chief Constable, who appoints and governs the force with powers of summary dismissal and punishment, but who acts in all things subject to the governing control of the Committee (sec. 974). In those towns which undertake to maintain a force distinct from that of the County the Head Constable is chosen by the town authorities and the direction of the force is superintended by a 'Watch Committee' of the Town Council. London, which employs, it is stated, one-third of the entire police force of the kingdom, has been given a special, exceptional system of its own. The city police are governed by a Commissioner and two Assistant Commissioners who are appointed by the Home Secretary and serve directly under his authority.

937. The police throughout the country are given something like military drill and training, the organization being made as perfect, the training as thorough, and the discipline as effective as possible. Ex-army officers are preferred for the office of Chief Constable.

II. Local Government.

938. **Complex Character of Local Government in England.** — The subject of local government in England is one of extreme complexity and, therefore, for my present purpose of brief description, one of extreme difficulty. So perfectly unsystematic, indeed, are the provisions of English law in this field that most of the writers who have undertaken to expound them, — even to English readers, — have seemed to derive a certain zest from the despairful nature of their task, — a sort of forlorn-hope enthusiasm. The institutions of local government in England have grown piece by piece as other English institutions have, and not according to any complete or logical plan of statutory construction. They are patch-work, not symmetrical net-work, and the patches are of all sizes, shapes, and materials.

939. "For almost every new administrative function," complains one writer on the subject, "the Legislature has provided a new area containing a new constituency, who by a new method of election choose candi-

dates who satisfy a new qualification, to sit upon a new board, during a new term, to levy a new rate [tax], and to spend a good deal of the new revenues in paying new officers and erecting new buildings."[1]

940. It has been the habit of English legislators, instead of perfecting, enlarging, or adapting old machinery, to create all sorts of new pieces of machinery with little or no regard to their fitness to be combined with the old or with each other. The Local Government Act of 1888 represents the first deliberate attempt at systematization; but even that Act did not effect system, and itself introduced additional elements of confusion by first adopting another Act (the Municipal Corporations Act of 1882) as its basis and then excepting particular provisions of that Act and itself substituting others in respect, not of all, but of some of the local administrative bodies meant to be governed by it. The supplementary legislation of 1894 introduced some further elements of consistent system; but did not after all very much simplify existing methods. It would seem as logical a plan of description as any, therefore, to discuss the older divisions and instrumentalities first and then treat afterwards of more recent legislative creations as of modifications, of however haphazard a kind, of these.

941. **General Characterization.** — In general terms, then, it may be said, that throughout almost the whole of English history, only the very earliest periods excepted, counties and towns have been the principal units of local government; that the parishes into which the counties have been time out of mind divided, though at one time of very great importance as administrative centres, were in course of time in great part swallowed up by feudal jurisdictions, and now retain only a certain minor part in the function, once exclusively their own, of caring for the poor; and that this ancient framework of counties, towns, and parishes has, of late years, been extensively overlaid and in large part obscured: (*a*) by the combination (1834) of parishes into 'Unions' made up quite irrespective of county boundaries and charged not only with the immemorial parish duty of maintaining the poor but often with sanitary regulation also and school superintendence,

[1] *Local Administration* (Imperial Parliament Series), by Wm. Rathbone, Albert Pell, and F. C. Montague, p. 14.

and generally with a miscellany of other functions; (*b*) by the creation of new districts for the care of highways; (*c*) by new varieties of town and semi-town government; and (*d*) by the subdivision of the counties (1889) into new administrative 'districts,' charged with general administrative functions. The only distinction persistent enough to serve as a basis for any classification of the areas and functions of the local administration thus constructed is the distinction between Rural Administration and Urban Administration, — a distinction now in part destroyed by the Act of 1888; and of these two divisions of administration almost the only general remark which it seems safe to venture is, that Rural Administration has hitherto rested much more broadly than does Urban on old historical foundations.

942. **The County: its Historical Rootage.** — For the County, with its influential Justices of the Peace and its wide administrative activities, is still the vital centre of rural government in England; and the Counties are in a sense older than the kingdom itself. Many of them, as we have seen (sec. 836), represent in their areas, though of course no longer in the nature of their government, separate Saxon kingdoms of the Heptarchy times. When they were united under a single throne they retained (it would appear) their one-time king and his descendants in the elder male line as their *eoldormen*. They retained also their old general council, in which *eoldorman* and bishop presided, though there was added presently to these presidents of the older order of things another official, of the new order, the king's officer, the Sheriff. To this council went up, as was of old the wont, the priest, the reeve, and four select men from every township, together with the customary delegates from the 'hundreds.'

943. Of course the Counties no longer retain these antique forms of government; scarcely a vestige of them now remains. But the old forms gave way to the forms of the present by no sudden or violent changes, and some of the organs of county government now in existence could adduce plausible proof of their descent from the manly, vigorous, self-centred Saxon institutions of the ancient time.

944. **Early Evolution of the County Organs.** — In Norman times the *eoldorman's* office languished in the shadow of the Sher-

iff's great authority. The spiritual and temporal courts were separated, too, and the bishop withdrew in large measure from official participation in local political functions. The County Court became practically the Sheriff's Court; its suitors the freeholders. Its functions were, however, still considerable: it chose the officers who assessed the taxes; it was the medium of the Sheriff's military administration; and it was still the principal source of justice. But its duties were not slow to decay. As a Court it was speedily handed over to the king's itinerant justices, who held their assizes in it and heard all important cases, all 'pleas of the Crown.' Its financial functions became more and more exclusively the personal functions of the Sheriffs, who were commonly great barons, who managed in some instances for a little while to make their office hereditary, and who contrived oftentimes to line their own pockets with the proceeds of the taxes: for great barons who were sheriffs were sometimes also officials of the Exchequer, and as such audited their own accounts. The local courts at last became merely the instruments of the Sheriffs and of the royal judges.

945. **Decline of the Sheriff's Powers.** — It was the overbearing power of the Sheriffs, thus developed, that led to the great changes which were to produce the county government of our own day. The interests alike of the Court and of the people became enlisted against them. The first step towards displacing them was taken when the royal justices were sent on circuit. Next, in 1170, under Henry II.'s capable direction, the great baronial sheriffs were tried for malfeasance in office, and, though influential enough to escape formal conviction, were not influential enough to retain their offices. They were dismissed, and replaced by Exchequer officials directly dependent upon the Crown. In 1194, in the next reign, it was arranged that certain 'custodians of pleas of the Crown' should be elected in the counties, to the further ousting of the Sheriffs from their old-time judicial prerogatives. Then came Magna Charta (1215) and forbade all participation by Sheriffs in the administration of the king's justice. Finally the tenure of the office of Sheriff, which was by that time little more than the chief place in the militia of the county and the chief ministerial office in connection with the administra-

tion of justice, was limited to one year. The pulling down of the old system was complete; fresh construction had already become necessary.

946. **Justices of the Peace.** — The reconstruction was effected through the appointment of 'Justices of the Peace.' The expedient of 'custodians of pleas of the Crown' (*custodes placitorum coronæ*) elected in County Court, as substitutes for the Sheriff in the exercise of sundry important functions of local justice, had proved unsatisfactory. They, too, like the Sheriffs, were curtly forbidden by Magna Charta to hold any pleas of the Crown; and they speedily became only the *coroners* we know ('crowners' Shakspere's grave-digger in *Hamlet* very appropriately calls them), whose chief function it is to conduct the preliminary investigation concerning every case of sudden death from an unknown cause. Better success attended the experiment of Justices of the Peace. At first 'Conservators' of the peace merely, these officers became, by a statute passed in 1360, in the reign of Edward III., *justices* also, intrusted with a certain jurisdiction over criminal cases, to the supplanting of the Sheriff in the last of his judicial functions, his right, namely, to pass judgment in his *tourn* or petty court on police cases, — to apply the discipline of enforced order to small offences against the public peace.

947. Henceforth, as it turned out, the process of providing ways of local government was simple enough, as legislators chose to conduct it. It consisted simply in charging the Justices of the Peace with the doing of everything that was necessary to be done. Slowly, piece by piece, their duties and prerogatives were added to, till the Justices had become immeasurably the most important functionaries of local government, combining in their comprehensive official characters almost every judicial and administrative power not exercised from London. Not till the passage of the Local Government Act of 1888 were they relegated to their older and more characteristic judicial functions, and their administrative and financial powers transferred to another body, the newly created County Council.

948. **Functions of Justices of the Peace prior to Recent Reforms.** — The Justice of the Peace has been very happily described as having been under the old system "the state's man of all work." His multifari-

ous duties brought him into the service (*a*) of the Privy Council, under whose Veterinary Department he participated in the administration of the Acts relating to contagious cattle diseases; (*b*) of the Home Office, under which he acted in governing the county constabulary, in conducting the administration of lunatic asylums, and in visiting prisons; (*c*) of the Board of Trade, under whose general supervision he provided and tested weights and measures, constructed and repaired bridges, and oversaw highway authorities; and (*d*) of the Local Government Board, under whose superintendence he appointed parish overseers of the poor, exercised, on appeal, a revisory power over the poor-rates, and took a certain part in sanitary regulation. The Justices, besides, formerly levied the county tax, or 'rate,' out of which the expenses of county business were defrayed; issued licenses for the sale of intoxicating drinks (as they still do), for the storage of gunpowder and petroleum, and for other undertakings required by law to be licensed; divided the counties into highway, polling, and coroner's districts; issued orders for the removal of paupers to their legal places of settlement; fulfilled a thousand and one administrative functions too various to classify, too subordinate to need enumeration, now that most of them have been transferred to the Councils. The trial of criminal cases, together with the performance of the various functions attendant upon such a jurisdiction, always constituted, of course, one of the weightiest duties of their office, and is now its chief and almost only duty.

949. "Long ago," laughs Mr. Maitland, speaking before the passage of the Act of 1888, "long ago lawyers abandoned all hope of describing the duties of a justice in any methodic fashion, and the alphabet has become the only possible connecting thread. A Justice must have something to do with 'Railroads, Rape, Rates, Recognizances, Records, and Recreation Grounds'; with 'Perjury, Petroleum, Piracy, and Playhouses'; with 'Disorderly Houses, Dissenters, Dogs, and Drainage.'"[1]

950. **Character and Repute of the Office of Justice.** — The office of Justice of the Peace is representative in the same sense, — not an unimportant sense, — in which the unreformed parliaments of the early part of the century were representative at any rate of the county populations. The Justices are appointed from among the more considerable gentry of the counties, and represent in a very substantial way the permanent interests of the predominantly rural communities over whose justice they preside. An interesting proof of their virtually representative character appears in the popularity of their office during the greater part of its history. Amidst all the extensions of the franchise, all the remaking of representative institutions which this century has witnessed in England, the Justiceship of the Peace remained all the while practically untouched, because on all hands greatly respected, until the evident need to introduce

[1] *Justice and Police*, p. 84.

system into local government, and the apparent desirability of systematizing it in accordance with the whole policy of recent reforms in England by extending the principle of popular representation by election to county government, as it had been already extended to administration in the lesser areas, led to the substitution of County Councils for the Justices as the county authority in financial and administrative affairs.

951. **The Lord Lieutenant.** — In the reign of Mary a '*Lord Lieutenant*' took the place of the Sheriff in the County as head of the militia, becoming the chief representative of the Crown in the County, and subsequently the keeper of the county records (*Custos Rotulorum*). The Sheriff, since the completion of this change, has been a merely administrative officer, executing the judgments of the courts, and presiding over parliamentary elections. The command of the militia remained with the Lords Lieutenant until 1871, when it was vested in the Crown, — that is assumed by the central administration. (Compare secs. 931-935.)

952. **The Reform of 1888.** — The reform of local administration proposed by the ministry of Lord Salisbury, in the spring of 1888, although not venturing so far as it would be necessary to go to introduce order and symmetry into a patch-work system, suggested some decided steps in the direction of simplification and coördination. The confusions of the existing arrangements were many and most serious. England was divided into counties, boroughs, urban sanitary districts, rural sanitary districts, poor-law parishes, poor-law unions, highway parishes, and school districts; and these areas had been superimposed upon one another with an astonishing disregard of consistent system, — without either geographical or administrative coördination. The confusions to be remedied, therefore, consisted (*a*) of the overlapping of the various areas of local government, the smaller areas not being in all cases subdivisions of the larger, but defined almost wholly without regard to the boundaries of any other areas; (*b*) of a consequent lack of coördination and subordination among local authorities, fruitful of the waste of money and the loss of efficiency always resulting from confusions and duplications of organization; (*c*) of varieties of time, method, and franchise in the choice of local officials; and (*d*) of an infinite complexity

in the arrangements regarding local taxation, the sums needed for the various purposes of local government (for the poor, for example, for the repair of highways, for county outlays, etc.) being separately assessed and separately collected, at great expense and at the cost of a great deal of vexation to the taxpayer.

953. The ministry at first proposed to remedy this confusion, at least in part, by largely centering administration, outside the greater towns, in two areas, the County and the District. The system of poor-relief, through parishes and unions, was to be left untouched, but a beginning was to be made in unification by making the Counties and Districts the controlling organs of local government; provision was to be made for extensive readjustments of boundaries so that the smaller rural areas might be brought into proper relation and subordination to the larger by making them in all cases at least subdivisions of counties; both County and District were to have representative councils presumably fitted ultimately to assume the whole taxing function; and the franchise by which these bodies were to be elected was to be assimilated to the simplest and broadest used in local and parliamentary elections.

954. Only a portion of this reform, however, it turned out, could be got through Parliament. The provisions relating to the formation of Districts were left out, and only the county was reorganized. The larger boroughs were given county privileges; the smaller were brought into new and closer relations with the reconstructed county governments. London, too, was given a county organization. The integration of the smaller areas of rural administration with the new county system was not accomplished till 1894.

955. **Administrative Counties and County Boroughs.** — The Act, as passed, coördinated Counties with what were thenceforth to be called 'county boroughs.' Every borough of not less than fifty thousand inhabitants at the time the Act was passed, or which was, before the passage of the Act, treated as a county (in all, sixty-one boroughs), was constituted a 'county borough,' and was formally put alongside the county in rank and privileges. This did not mean that these boroughs were to be given a county or-

ganization. Paradoxically enough, it meant just the opposite, that the counties were to be given an organization closely resembling that already possessed by the boroughs. The nomenclature of the Act would be more correct, though possibly less convenient, had it called the counties 'borough counties' instead of calling some of the boroughs 'county boroughs.' The measure has been very appropriately described as an Act to apply the Municipal Corporations Act of 1882, whose main provisions date back as far as 1835 (sec. 989), to county government, with certain relatively unimportant modifications.

956. The counties designated by the Act are dubbed 'administrative counties,' because they are not in all cases the historical counties of the map. In several instances counties are separated into parts for the purposes of the reorganization. Thus the East Riding of Yorkshire constitutes one 'administrative county,' the North Riding another, and the West Riding a third; Suffolk and Sussex also have each an East and West division; Lincoln falls apart into three administrative counties, etc. All boroughs of less than 50,000 inhabitants not treated as counties are more or less incorporated with the counties in which they lie. (See 997.)

957. **The County Councils: their Constitution.** — In pursuance of the purpose of assimilating county to borough organization, the counties are given representative governing assemblies composed of councillors and aldermen, presided over by a chairman whose position and functions reproduce those of the borough mayors, and possessing as their outfit of powers almost all the miscellany of administrative functions hitherto belonging to the Justices of the Peace. There is not, it should be observed, a Council *and* a Board of Aldermen, as in American cities, but a single body known as the Council and composed of two classes of members, the one class known as Aldermen, the other as Councillors. These two classes differ from each other, not in power or in function, but only in number, term, and mode of election. The Councillors are directly elected by the qualified voters of the County and hold office for a term of three years; the Aldermen are one-third as many as the Councillors in number, are elected by the Councillors, either from their own number or from the qualified voters outside, and hold office for six years, one-half of their number, however, retiring every three years, in rotation.

This single-chambered Council of Aldermen and Councillors elects its own chairman, to serve for one year, and pays him such compensation as it deems sufficient. During his year of service the chairman exercises the usual presidential, but no independent executive, powers, and is authorized to act as a Justice of the Peace, along with the rest of the 'Commission' of the County.

958. Any one may be elected a councillor who is a qualified voter in the county, or who is entitled to vote in parliamentary elections by virtue of ownership of property in the county; and in the counties, though not in the boroughs, from whose constitution this of the counties is copied, peers owning property in the county and "clerks in holy orders and other ministers of religion" may be chosen to the Council.

959. **The number of councillors,** and consequently also the number of aldermen, in each County Council (for the latter number is always one-third of the former) was fixed in the first instance by an order of the Local Government Board, and is in some cases very large. Thus Lancashire has a Council (aldermen, of course, included) of 140 members, the West Riding of Yorkshire a council of 120, Devon a council of 104. Rutland, whose Council is the smallest, has 28. The average is probably about 75.

960. For the election of councillors the county, including such boroughs as are not 'county boroughs,' is divided into *electoral districts*, corresponding in number to the number of councillors, one councillor being chosen from each district. The number of these districts having been determined by the order of the Local Government Board, their area and disposition were fixed in the first instance by Quarter Sessions, or, within the non-county boroughs needing division, by the borough Council, due regard being had to relative population and to a fair division of representation between rural and urban populations.

961. The number of councillors and the boundaries of electoral districts may be changed by order of the Local Government Board upon the recommendation of the Council of a borough or county.

962. **The County Franchise.** — The councillors are elected, to speak in the most general terms, by the resident ratepayers of the county. Every person, that is to say, not an alien or otherwise specially disqualified, who is actually resident within the county or within seven miles of it, paying rates in the county and occupying, within the county, either jointly or alone, any house, warehouse, counting-house, shop, or other building for which he pays rates is entitled to be enrolled (if his residence has been of twelve months' standing) and to vote as a county elector.

963. A person who occupies land in the county of the annual value of £10 and who resides in the county, or within seven miles of it, may vote in the elections for county councillors though his residence has been of only six months' standing. Single women who have the necessary qualifications as taxpayers and residents are entitled to vote as county electors.

964. **Powers of the County Councils.** — The Council of each County is a body corporate and as such may have a common seal, hold property, make by-laws, etc. Its by-laws, however, unless they concern nuisances, are subject to approval by the Secretary of State [the Home Secretary], and may be annulled by an order in Council.

(1) The Council holds and administers all county property, and may purchase or lease lands or buildings for county uses;

(2) With it rests the duty of maintaining, managing, and, when necessary, enlarging, the pauper lunatic asylums of the county, and of establishing and maintaining, or contributing to, reformatory and industrial schools;

(3) It is charged with maintaining county bridges, and all main roads in every part not specially reserved by urban authorities for their own management because lying within their own limits; and it may declare any road a main road which seems to serve as such, and which has been put in thorough repair, before being accepted by the county, by the local highway authorities;

(4) It administers the statutes affecting the contagious diseases of animals, destructive insects, fish preservation, weights and measures, etc.;

(5) It appoints, pays, and may remove the county Treasurer, the county coroner, the public surveyor, the county analyst, and all other officers paid out of the county rates, — except the clerk of the Peace and the clerks of the Justices, — including the medical health officers, though these latter functionaries report, not to the Council (the Council receives only a copy of their report), but to the Local Government Board, and the only power of the Council in the premises is to address to the Board, independently and of their own motion, representations as to the enforcement of the Public Health Acts where such representations seem necessary;

(6) It determines the fees of the coroner and controls the division of the county into coroners' districts;

(7) It divides the county into polling districts also for parliamentary elections, appoints voting places, and supervises the registration of voters;

(8) It sees to the registering of places of worship, of the rules of scientific societies, of charitable gifts, etc.

965. It is obviously impossible to classify or make any generalized statement of this miscellany of powers: they must be enumerated or not stated at all. They are for the most part, though not altogether, the administrative powers formerly intrusted to the Justices of the Peace.

966. **The Licensing Function,** being semi-judicial, is left in most cases with the Justices of the Peace; but the County Council is assigned the granting of licenses to music and dancing halls, to houses which are to be devoted to the public performance of stage plays, and for the keeping of explosives.

967. Oddly enough, the County Council is, by another section of the Act of 1888, authorized to delegate its powers of licensing in the case of playhouses and in the case of explosives back to the Justices again, acting in petty sessions. The same section also permits a similar delegation to the Justices of the powers exercised by the Council under the Act touching contagious cattle diseases.

968. **The Financial Powers** of the Council are extensive and important. The Council takes the place of the Justices in determining, assessing, and levying the county, police, and hundred rates, in disbursing the funds so raised, and in preparing or revising the basis or standard for the county rates; though in this last matter it acts subject to appeal to Quarter Sessions. It may borrow money, "on the security of the county fund," for the purpose of consolidating the county debt, purchasing property for the county, or undertaking permanent public works, provided it first obtain the consent of the Local Government Board to the raising of the loan. That Board gives or withholds its consent only after a local inquiry, and, in case it assents, fixes the period within which the loan must be repaid, being itself limited in this last particular by a provision of law that the period must never exceed thirty years.

969. If the debt of the county already exceed ten per cent. of the annual ratable value of the ratable property of the county, or if the proposed loan would raise it above that amount, a loan can be sanctioned

only by a *provisional* order of the Board, — an order, that is, which becomes valid only upon receiving the formal sanction of Parliament also, given by public Act. A county may issue stock, under certain limitations, if the consent of the Local Government Board be obtained.

970. **Additional Powers.** — The Act of 1888 provides that any other powers which have been conferred upon the authorities of particular localities by special Act, and which are similar in character to those already vested in the County Councils, may be transferred to the proper County Councils by *provisional* order of the Local Government Board; and also that a similar provisional order of that Board may confer upon a County Council any powers, *arising within the County*, which are now exercised by the Privy Council, a Secretary of State, the Board of Trade, the Local Government Board itself, or any other government department, provided they be powers conferred by statute and the consent of the department concerned be first secured.

971. **The County Budget.** — At the beginning of every local financial year (April 1st) an estimate of the receipts and expenditures of the year is submitted to the Council, and upon the basis of this, the Council makes estimate of the sums to be needed, and fixes the rates accordingly. The Council's estimate is made for two six-month periods, and is subject to revision for the second six-month period, provided the experience of the first prove it necessary either to increase or decrease the amounts to be raised.

972. Returns of the actual receipts and expenditures of each financial year are also made to the Local Government Board, in such form and with such particulars as the Board directs; and full abstracts of these returns are annually laid before both Houses of Parliament. The county accounts are, moreover, periodically audited by district auditors appointed by the Local Government Board. The accounts of the county Treasurer are audited by the Council.

973. Local rates are assessed exclusively upon real estate, and, until the passage of the Local Government Act of 1888, it was the habit of Parliament to make annual 'grants in aid of the rates' from the national purse, with the idea of paying out of moneys raised largely upon personal property some part of the expense of local administration. The Act of 1888 substitutes another arrangement. It provides that all moneys collected from

certain licenses (a long list of them, from liquor licenses to licenses for male servants and guns), together with four-fifths of one-half of the proceeds of the probate duty, shall be distributed among the counties from the imperial treasury, under the direction of the Local Government Board, for the purpose of defraying certain specified county expenses, notably for the education of paupers and the support of pauper lunatics.

974. **The Police Powers**, long exercised by the Justices of the Peace, are now exercised by a joint committee of Quarter Sessions and the County Council. This committee is made up, in equal parts, of Justices and members of the Council; elects its own chairman, if necessary (because of a tie vote) by lot; and acts, when appointed, not as exercising delegated authority, but as an independent body. The term of the committeemen is, however, determined by the bodies which choose them.

975. **The Parish.** — Parishes there have been in England ever since the Christian church was established there; but the Parish which now figures in English local government inherits nothing but its name intact from those first years of the national history. The church, in its first work of organization, used the smallest units of the state for the smallest divisions of its own system: it made the township its parish; and presently the priest was always to be seen going up with the reeve and the four men of the township to the hundred and the county courts. Only where the population was most numerous did it prove necessary to make the parish smaller than the township; only where it was least numerous did it seem expedient to make the parish larger than the township. Generally the two were geographically coincident. During much the greater part of English history, too, citizenship and church membership were inseparable in fact, as they still are in legal theory. The vestry, therefore, which was the assembly of church-members which elected the church-wardens and regulated the temporalities of the local church, was exactly the same body of persons that, when not acting upon church affairs, constituted the township meeting. It was the village moot 'in its ecclesiastical aspect.' And when the township privileges were, by feudalization, swallowed up in the manorial rights of the baronage, the vestry was all that remained of the old organiza-

tion of self-government; for the court, or civil assembly, of the township was superseded by the baron's manorial court. But the church was not absorbed; the vestry remained, and whatever scraps of civil function escaped the too inclusive sweep of the grants of jurisdiction to the barons the people were fain to enjoy as vestrymen.

976. **The Poor-law Parish.** — It was in this way that it fell out that the township, when acting in matters strictly non-ecclesiastical, came to call itself the parish, and that it became necessary to distinguish the 'civil parish' from the 'ecclesiastical parish.' The vestry came at last to elect, not church-wardens only, but way-wardens also, and assessors; and in the sixteenth century (1535, reign of Henry VIII.) the church-wardens were charged with the relief of the poor. We are thus brought within easy sight of the parish of to-day. The legislation of the present century, which has been busy about so many things, has not failed to readjust the parish and in most cases, as altered by statute to suit the conveniences of political administration, "the modern civil parish coincides neither with the ancient civil parish, nor with the ecclesiastical parish"; but old parochial associations still survive, and many of the ancient parochial duties connected with the support of the poor. Until 1894 the parochial authority was still the ancient vestry, reduced almost to a minimum of powers, indeed, but not yet taken from its seat of control. In 1894 Parliament completed the reorganization of local government begun in 1888: vestries were relegated, at any rate in all rural districts, to the exercise of ecclesiastical functions alone; and the parishes, with a new democratic organization, became once more the vital units of local self-government.

977. **The Reform of 1894.** — All the legislation attempted in England during the present century with regard to local government, whether its object was first construction or reform, has carefully observed the difference between 'rural' and 'urban' areas; and the law of 1894 is no exception to the rule. The parishes which lie within the limits of boroughs or within the limits of those more thickly settled areas which, though without borough organization, are yet distinguished by the law as 'urban' in their means of local government (sec. 986), are not directly

affected by the Act. But the organization and action of the rural parishes are revolutionized. They are made self-governing communes, with a very notable list of powers and privileges.

978. Every rural parish, great or small, has now its primary assembly, its *parish meeting*, of which every person of legal age in the parish, man or woman, is a member who is qualified to vote for members of the County Council (secs. 962, 963) or for members of Parliament (secs. 894, 895); and married women are included as well as single. In parishes which have less than three hundred inhabitants the *parish meeting* is the actual governing body, unless the County Council sees fit, with the consent of the parish electors, to set up a *parish council* (and there were some six thousand such parishes in 1894); but in parishes which have a population of more than three hundred a *parish council* of from five to fifteen members, — the County Council determines the number in each case, — is given charge of affairs, and the *parish meeting* exercises only the functions of electing councillors, consenting to the larger sorts of loans, and voting upon the adoption and operation of certain statutes, known as the 'adoptive acts,' which Parliament has left it to them to adopt and act upon or not as they please. These are the statutes with regard to street lighting and watching, the establishment of baths and wash-houses, the undertaking of certain public improvements, the foundation of public libraries, and like matters. Women, whether married or single, are eligible for election to the *parish councils*, and even to the chairmanship of those bodies. The term of a *parish council* is one year.

979. Parishes which are governed by a *parish meeting* only, without a council, usually appoint one or more executive committees for the actual work of administration; and, if they accept the 'adoptive' acts mentioned in the last paragraph, they elect commissioners to carry them into execution; but in very many cases the County Councils have given these small parishes councils, and where there are councils they are the executive agents of the parish in practically every sort of business.

980. The chairman of a *parish council* is *ex officio* a Justice of the Peace for the county in which he resides; and this feature of the law has, in view of the very large number of parishes in every county, radically changed the character of the commission of the peace. Any one may be a parish councillor, and any one may be a chairman of a *parish*

council who can be a member of a *parish meeting* (sec. 978), and a seat on the county bench of Justices is consequently no longer by any means the exclusive possession of country gentlemen.

981. The parish councillors are elected in *parish meeting*, by a mere show of hands, — unless a formal poll be demanded. No elector, whatever his property or interest, can cast more than one vote in any one parish; but those who have the requisite property qualification in more than one parish can be registered, and can vote in every parish in which they can prove the possession of the requisite amount of property. Married women cannot qualify, however, upon the same property upon which their husbands have qualified.

982. **Parochial Powers.** — The *parish councils* (or the *parish meetings*, as the case may be) exercise a miscellany of powers variously distributed, until 1894, amongst vestries, church-wardens, overseers of the poor, and commissioners of various sorts and functions. A *parish council* is a body corporate, and as such owns and manages the property of the parish. It may acquire property by gift or purchase, — not merely for the erection of parochial buildings and other directly parochial uses, but also for the establishment and maintenance of recreation grounds, and for the purpose of making allotments at a fixed rental to such residents of the parish as may wish to acquire holdings. It has control of the water supply of the parish, and is the local sanitary authority; it can acquire, maintain, or change public rights of way; it maintains the highways and the enclosed burial grounds of the parish; and it provides for the prevention and extinguishment of fires. It fixes the local assessment and tax rate, on appeal; prepares the parish register; and appoints the overseers and assistant overseers of the poor, who assess the poor rates and make out the jury lists and the lists of parliamentary and county voters. The right to appoint the overseers was taken over from the Justices of the Peace.

983. **Supervision.** — The County Councils are given supervisory charge of the new system of parish government. They group or divide the parishes for action under the law, in their discretion; they may create or dissolve *parish councils* in the smaller parishes; they determine the number of members in each *parish council;* supervise the action of the *parish councils* in the matter of loans and land allotments; regulate in some degree the custody and preservation of the parish books and documents; and in many other ways stand superintendent over their exercise of powers.

984. **Urban parishes** are for the most part unaffected by the Act of 1894, and still act in civil as well as in church matters through their vestries, as of old.

985. **The Rural District.** — Before 1894 the rural parishes were grouped in poor-law Unions, governed, in sundry other matters as well as in the care of the poor, by a Board of Guardians. Various Highway Boards, too, Burial Boards, Bath Commissioners, Library Commissioners, and Public Improvement Boards, acted for the parishes singly or in groups in the several special matters committed to their direction. The Act of 1894 substituted 'Rural Districts' for the Unions, gave to each District an administrative Council, and united in the hands of that Council the various local functions hitherto dispersed and separated. The *District Council* is elected for a term of three years (as the Board of Guardians was), and is charged with the general oversight and conduct of all business affecting the common interests of the parishes embraced within this District in matters of local government. It takes the place of the old Board of Guardians in the administration of the poor law, and is the general highway, sanitary, and administrative body of the District. Its members are elected by the parishes in *parish meeting*, and any one may be chosen who is a parochial elector in one of the parishes of the District, or who has resided in the District for a twelvemonth preceding the election. The chairman of a *District Council*, like the chairman of a *parish council*, is *ex officio* a Justice of the Peace for the county.

986. **The Urban District.** — The urban parishes, outside incorporated boroughs, are also grouped into Districts, each with its administrative Council, and to these Councils are assigned much the same powers as those which are exercised by the Councils of the rural Districts, except that they do not constitute the poor-law authority of the District. That is still, in the urban Districts, a distinct and separate Board of Guardians, selected for the purpose. The Local Government Board may, in its discretion, confer upon Urban District Councils, by order, any or all of the powers of rural *parish councils*, however, and so render them the most important administrative authorities for their area.

987. **Women** are eligible to serve upon District Councils as well as upon parish councils, and are eligible also to be chosen chairmen; though a woman, if chairman, is not entitled to act as a Justice of the Peace.

988. The County Councils have a certain very considerable supervisory power over both Rural and Urban District Councils, fixing or altering the number of Councillors, hearing appeals from the parishes against their action or default, etc.

989. **Municipal Corporations.** — The constitution of those English towns which have fully developed municipal organizations rests upon the Municipal Corporations Act of 1835 and its various amendments, as codified in an Act of 1882 of the same name. This latter Act is, in its turn, in some degree altered by the Local Government Act of 1888. If the inhabitants of any place wish to have it incorporated as a municipality, they must address a petition to that effect to the Privy Council. Notice of such a petition must be sent to the Council of the county in which the place is situate and also to the Local Government Board. The Privy Council will appoint a committee to consider the petition, who will visit the place from which the petition comes and there see and hear for themselves the arguments *pro* and *con*. All representations made upon the subject by either the County Council or the Local Government Board must also be considered.

990. Generally there is considerable local opposition either to such a petition being offered or to its being granted when offered; for the government of the place is usually already in the hands of numerous local authorities of one kind or another who do not relish the idea of being extinguished; and there are always, besides, persons who do not care to take part in bearing the additional expenses of a more elaborate organization.

991. If the petition be granted, the Privy Council issues a charter of incorporation to the place, arranging for the extinction of competing local authorities, setting the limits of the new municipality, determining the number of its councillors, and often even marking out its division into wards.

992. Once incorporated, the town takes its constitution ready-made from the Act under whose sanction it petitioned for incorporation. That Act provides that the borough shall be governed by a mayor, aldermen, and councillors. The councillors hold office for a term of three years, one-third of their number going

out, in rotation, every year. There are always added to the councillors one-third as many aldermen elected by the councillors for a term of six years, one-half of their number retiring from office every three years, by rotation. The mayor is elected by the Council, — by the aldermen and councillors, that is, who constitute but a single body, — holds office for one year only, and, unlike the councillors and aldermen, receives a salary. The councillors are elected by the resident ratepayers of the borough. "Every person who occupies a house, warehouse, shop, or other building in the borough, for which he pays rates, and who resides within seven miles of the borough, is entitled to be enrolled as a burgess."[1]

993. **Judicial Status of Boroughs.** — Whatever powers are not specifically granted to a municipality remain with previously constituted authorities. The Municipal Corporations Act does not provide for the exercise of judicial powers by the authorities of a borough by virtue of their separate incorporation. Unless additional special provision is made to the contrary, a municipality remains, for the purposes of justice, a part of the county. By petition, however, it may obtain an additional 'commission of the peace' for itself, or even an independent Court of Quarter Sessions. Either, then, (*a*) a borough contents itself in judicial matters with the jurisdiction of the county Justices; or (*b*) it obtains the appointment of additional Justices of its own, who are, however, strictly, members of the county commission and can hold no separate Court of Quarter Sessions; or (*c*) it acquires the privilege of having Quarter Sessions of its own. In the latter case a professional lawyer is appointed by the Crown, under the title of Recorder, to whom is given the power of two Justices acting together and the exclusive right to hold Quarter Sessions, — who is made, as it were, a multiple Justice of the Peace.

994. Boroughs which have a separate commission of the peace are known as "counties of towns"; those which have independent Quarter Sessions as "quarter sessions boroughs." Every mayor is *ex officio* Justice of the Peace, and continues to enjoy that office for one year after the expiration of his term as mayor. This is true even when his borough has no separate commission of the peace.

[1] Chalmers, *Local Government*, p. 74.

995. **County Boroughs.** — In every borough the mayor, aldermen, and councillors, who sit together as a single body, constitute the 'Council' of the corporation; and the powers of the Council, if the borough be a 'County Borough,' are very broad indeed. Since the passage of the Local Government Act of 1888, it is necessary to distinguish, in the matter of powers, several classes of boroughs. 'County Boroughs' stand apart from the counties in which they lie, for all purposes of local government, as completely as the several counties stand apart from each other. Except in the single matter of the management of their police force, they may not even arrange with the county authorities for merging borough with county affairs. Their Councils may be said, in general terms, to have, within the limits of the borough, all the powers once belonging to the county Justices except those strictly judicial in their nature, all the sanitary powers of urban sanitary authorities, often the powers of school administration also, — all regulative and administrative functions except those of the poor-law Unions into which urban parishes are still grouped. In the case of these 'county boroughs,' all powers conferred upon counties are powers conferred upon them also.

996. If the Council of any borough or of a county make representation to the Local Government Board that it is desirable to constitute a borough which has come to have a population of not less than fifty thousand a 'county borough,' the Board shall, unless there be some special reason to the contrary, hold a local inquiry and provide for the gift of county *status* to the borough or not as they think best. If they order the borough constituted a 'county borough,' the order is *provisional* merely, and must be confirmed by Parliament.

997. **Other Boroughs.** — Boroughs which have not been put in the same rank with counties and given full privileges of self-administration as 'county boroughs,' fall into three classes in respect of their governmental relations to the counties in which they lie:

(1) Those which have their own Quarter Sessions and whose population is ten thousand or more. These constitute for several purposes of local government parts of the counties in which they are situate. The main roads which pass through them are cared for by the county authorities, unless within twelve months after the date at which the Act of 1888 went into operation (or after

the date at which any road was declared a 'main road') the urban authorities specially reserved the right to maintain them separately. They contribute to the county funds for the payment of the costs of the assizes and judicial sessions held in them. They send members, too, to the County Council. Their representatives, however, cannot vote in the County Council on questions affecting expenditures to which the parishes of the borough do not contribute by assessment to the county rates. Beyond the few matters thus mentioned, they are as independent and as self-sufficient in their organization and powers as the 'county boroughs' themselves.

(2) Boroughs which have separate Quarter Sessions but whose population numbers less than ten thousand. These are made by the Act of 1888 to yield to the Councils of the counties in which they lie the powers once exercised by their own Councils or Justices in respect of the maintenance and management of pauper lunatic asylums, their control of coroners, their appointment of analysts, their part in the maintenance and management of reformatory and industrial schools, and in the administration of the Acts relating to fish conservation, explosives, and highways and locomotives.

(3) Boroughs which have not a separate court of Quarter Sessions and whose population is under ten thousand are for all police purposes parts of the counties in which they are situate, and have, since 1888, been, for all save a few of the more exclusively local matters of self-direction, merged in the counties, in whose Councils they are, of course, like all other parts of the counties, represented.

998. Every borough has its own paid Clerk and Treasurer, who are appointed by the Council and hold office during its pleasure, besides "such other officers as have usually been appointed in the borough, or as the Council think necessary." If a borough have its own Quarter Sessions, it has also, as incident to that Court, its own Clerk of the Peace and its own Coroner.

999. **The Financial Powers** of a municipal Council are in all cases strictly limited as regards the borrowing of money. "In each instance, when a loan is required by a municipal corporation, the controlling authority [the Local Government Board] is to be applied to for its consent. A local inquiry, after due notice, is then held, and if the loan is approved,

a term of years over which the repayment is to extend is fixed by the central authority."[1] The same powers are exercised by the Local Government Board with regard to the larger loans of parish and district Councils also.

1000. "The accounts of most local authorities are now audited by the Local Government Board, but boroughs are exempt from this jurisdiction. The audit is conducted by three borough auditors, two elected by the burgesses, called elective auditors, one appointed by the mayor, called the mayor's auditor."[2]

1001. **Boroughs and Urban Districts.** —The difference between boroughs and urban districts is not at all a difference of size, — boroughs range from a few hundred to half a million inhabitants and urban districts from a few hundred to a hundred thousand;[2] it has hitherto been a difference, apparently, of local preference, rather, and of legal convenience. The boundaries of a borough, when once fixed by a charter of incorporation, could, until the passage of the Act of 1888, be altered only by a special Act of Parliament: it was much easier to apply to the Local Government Board, which could of its own authority create what was then known as an Urban *Sanitary* District. As towns already incorporated grew, therefore, the added portions became independently incorporated as Urban Sanitary Districts, and thus the town was pieced out. One writer was able to say, in 1882, "Nowhere, from one end of England to the other, do we find an instance (Nottingham alone excepted) of a large borough which is municipally self-contained, and consequently self-governing."[3]

1002. In the Local Government Act of 1888 it was provided that the boundaries of a borough might be altered by provisional order of the Local Government Board, upon the address of the borough Council. This order, being provisional, must receive the sanction of Parliament, and is made only after local inquiry. The proceedings, therefore, for changing the boundaries of a borough were still left much more elaborate and difficult than the free action of the Local Government Board with reference to urban districts.

1003. **Central Control of Urban Authorities.** — Full municipal corporations look partly (in the matter of sanitary regulation, for example,)

[1] Bunce, *Cobden Club Essays*, 1882, p. 283; title, "Municipal Boroughs and Urban Districts." [2] Chalmers, p. 87. [3] Bunce, p. 298.

to the Local Government Board as a central authority exercising powers of supervision, partly (in the management of the constabulary, for instance,) to the Home Office, and partly (if seaports) to the Board of Trade. Urban Districts, however, have but a single central authority set over them, the Local Government Board.

1004. **London.** — The metropolis was, until the passage of the Act of 1888, the unsolved problem, the unregenerate monster, of local government in England. The vast aggregation of houses and population known by the world as 'London,' spreading its unwieldy bulk over parts of the three counties of Middlesex, Surrey, and Kent, consisted of the *City* of London, a small corporation at its centre confined within almost forgotten boundaries, still possessing and belligerently defending mediæval privileges and following mediæval types of organization and procedure, and, round about this ancient City as a nucleus, a congeries of hundreds of old parishes and new urban districts made from time to time to meet the needs of newly grown portions of the inorganic mass. This heterogeneous body of mediæval trade guilds, vestries, and sanitary authorities had been in some sort bound together since 1855 by a Metropolitan Board of Works which exercised certain powers over the whole area outside the 'City.'

1005. The Local Government Act of 1888 made of the metropolis, not a 'county borough,' but a county, — the 'Administrative County of London' — with its own Lord Lieutenant, Sheriff, and Commission of the Peace, as well as its own Council. Its numerous parishes were left to act, as formerly, under their several vestries; and the Act of 1894 has given to those vestries the same constitution and substantially the same powers that are elsewhere in the kingdom possessed by the Urban District Councils (sec. 986). The 'City' is left to occupy its separate place in the great metropolitan county as a quarter sessions borough not enjoying separate county privileges, — with some limitations special to its case.

1006. The number of councillors in the London County Council is fixed at twice the number of members returned to Parliament at the time of the passage of the Act of 1888 by the various constituencies of the metropolitan area. The councillors, thus, number 118. The Council of the Metropolis is put upon an exceptional footing with regard to its quota of

aldermen. The aldermen are to be one-sixth, instead of one-third, as many as the councillors. The total membership of the London Council is, therefore, 137.

1007. **School Districts.** — The only important area remaining to be mentioned is the School District. Under the great Education Act of 1870 and the supplementary Acts of 1876 and 1880, England is divided for educational purposes into districts which are under the supervision of the Education Department of the Privy Council (sec. 883). These districts are not mapped out quite so independently of previously existing boundaries as other local areas have been; they are made to coincide, so far as possible, with parishes or with municipal boroughs, the adjustment of their boundaries being left, however, to the discretion of the Education Department. Those districts which desire such an organization are given an elective School Board, chosen by the ratepayers, which has power to compel attendance upon the schools in accordance with the Education Acts, and to provide, under the direction of the Department, the necessary school accommodation. Other districts are governed in school matters by an Attendance Committee, simply, which is a sub-committee of some previously existing authority (in boroughs, of the town council, for instance) and whose only duties are indicated by its name.

1008. The plan of public education in England contemplates the assistance and supplementing of private endeavor. Where private schools suffice for the accommodation of the school population of a district, the government simply superintends, and, under certain conditions, aids. Where private schools are insufficient, on the other hand, the government establishes schools of its own under the control of a school board.

1009. **Central Control.** — The plan of central control in England is manifestly quite indigenous. The central government is not present in local administration in the person of any superintending official like the French Prefect (secs. 442, 445, 454), or any dominant board like the 'Administration' of the Prussian Government District (secs. 600–604). There has, indeed, been developing in England throughout the last half of this century a marked tendency to bring local authorities more and more under the supervision in important matters of the government departments in London, — a tendency which has led to the concentra-

tion, since 1871, in the hands of the Local Government Board of various powers once scattered among such authorities as the Home Office, the Privy Council, etc. But this tendency, which is towards control, has not been towards centralization. It has, so far, not gone beyond making the advice of the central authority always accessible by local officers or bodies, and its consent necessary to certain classes of local undertakings. The central government has not itself often assumed powers of origination or initiative in local affairs. Even where the Local Government Board is given completest power the choice of the officers who are to put its regulations into force is generally left with the rate-payers in the districts concerned. Thus the authority of the Board over the Guardians of the Poor is complete; but the Guardians are elected in the parishes. Its authority in sanitary matters makes its directions imperative as to the execution of the Public Health Acts; but in many cases the local health officers are appointees of the local bodies. It may disallow the by-laws passed by the boards of sanitary districts, and the by-laws enacted by the county authorities, unless they affect nuisances, may be annulled by an order in Council; but these are powers sparingly, not habitually, used. In the matter of borrowing money, too, local authorities are narrowly bound by the action of the Local Government Board; and its assent to propositions to raise loans is seldom given without very thorough inquiry and without good reason shown. But all these are *functions of system*, so to say, rather than of centralization. Coördination in methods of poor-relief is sought, that relief being given under national statutes, and the coöperation of central with local judgment in financial matters, local debts constituting a very proper subdivision of national finance. But the spirit in which the control is exercised, as well as the absence of permanent officials representing the central authority in local government, and even of permanent instrumentalities for the administration of financial advice, bespeak a system of coöperation and advice rather than of centralization.

1010. **Local Government in Scotland.** — An Act of 1889 extended to Scotland a system of county government substantially the same as that created for England by the Act of 1888; and the Act of 1894 put *parish councils* like those of England into the

place formerly held by parochial Boards, and erected a separate Local Government Board for Scotland, of which the Secretary for Scotland was made President.

The Government of the English Colonies.

1011. **English Colonial Expansion.** — Doubtless the most significant and momentous fact of modern history is the wide diffusion of the English race, the sweep of its commerce, the dominance of its institutions, its imperial control of the destinies of half the globe. When, by reason of the closing of the old doors of the East by the Turk and the consequent turning about of Europe to face the Atlantic instead of the Mediterranean, England was put at the front instead of at the back of the nations of the Continent, a profound revolution was prepared in the politics of the world. England soon defeated Holland and Spain and Portugal, her rivals for the control of the Atlantic and its new continents; and steadily, step by step, she has taken possession of almost every new land worth the having in whatever quarter of the globe. With her conquests and her settlers have gone also her institutions, until now her people everywhere stand for types of free men, her institutions for models of free government.

1012. **English Colonial Policy.** — It was only by slow degrees, however, that England learned the right policy towards her colonies. She began, as Rome did, by regarding her possessions as estates, to be farmed for her own selfish benefit. Nothing less than the loss of America sufficed to teach her how short-sighted such a policy was. But, unlike Rome, she was fortunate enough to lose the best part of her possessions without being herself overwhelmed; and even after the loss of America time and opportunity offered for the building up of another colonial empire scarcely less great.

1013. Towards her present colonies her policy is most liberal; for the England of the present day is a very different England from that which drove America into rebellion. Even the notable lesson emphasized in the loss of America would not have sufficed to bring England to her senses touching her true interests in the colonies, had she not herself speedily thereafter been brought by

other causes to a change of heart. The movements of opinion which stirred her to religious revival, to prison reform, to enlightened charity, to the reform of parliamentary representation, to a general social and political regeneration, stirred her also, no doubt, to vouchsafe to her colonists full rights as Englishmen.

1014. **Lord Durham in Canada.** — The turning point was reached in 1837, when a rebellion broke out in Lower Canada. Lower Canada was French Canada. Its government, like the governments of the American states south of it in their own colonial times, consisted of an Executive, a Legislative Council nominated by the Crown, and a legislative chamber elected by the colonists. The colonists had been exasperated by just such arbitrariness and lack of sympathy on the part of the Governor and his Council, and just such efforts to make the salaries and the maintenance of the judicial officers of the colony independent of the appropriations voted by the popular assembly, as had hastened the separation of the United States from England; and at last rebellion had been made to speak the demands of the colonists for constitutional reform. The rebellion was put down, but the defeated colonists were not treated as they would have been in 1776. A royal commissioner was sent out to them from the mother country to redress their grievances by liberal measures of concession and reform. This commissioner was Lord Durham. He spoiled his mission by well-meant but arbitrary conduct which was misunderstood at home, and he was recalled; but his report upon the condition of Canada and the measures necessary for her pacification may justly be called the fountain head of all that England has since done for the betterment of government in her colonies. Lord Durham recommended nothing less than complete self-government, with interference from England in nothing but questions immediately and evidently affecting imperial interests. 1847 saw independent responsible self-government completely established in Canada, and subsequent years have seen it extended to all the British colonies capable of self-direction.

1015. **The Self-governing Colonies.** — The English colonies, as at present organized, may be roughly classified in two groups as (*a*) *Self-governing* and (*b*) *Crown* colonies. The self-governing colonies are nine in number; namely, Canada, Newfoundland,

Cape of Good Hope, the four colonies of the east and south of Australia (Queensland, New South Wales, Victoria, South Australia), Tasmania, New Zealand. In all of these there is practically complete independence of legislation in all matters not directly touching imperial interests: and in all there is full responsible government, — government, that is, through ministers responsible to representatives of the people for their policy and for all executive acts, because chosen from and representing the majority in the popular chamber. In the Cape of Good Hope, Tasmania, Victoria, and South Australia, both branches of the legislature are elected; in the other five the upper chamber, the Legislative Council, as it is invariably called outside of Canada, is nominated by the Executive. But the origin of the upper chamber does not affect the full responsibility of the ministers or the practically complete self-direction of the colony.

1016. **The Government of Canada.** — In 1840 Parliament provided by Act for the union of Upper and Lower Canada (now the provinces of Ontario and Quebec) upon a basis suggested by Lord Durham's report; but the legislative union of these two provinces, the one English, the other almost wholly French, was ill-advised and proved provisional only. Although an Act of 1854 granted to the united colonies a government as nearly as might be modelled upon the government of England herself, no satisfactory basis of self-government was reached until, by the 'British North America Act' of 1867, the colonies were at once separated and reintegrated by means of a federal constitution. That Act is the present constitution of the "Dominion of Canada." Under that constitution the seven provinces now comprised within the Dominion, namely, Ontario, Quebec, Nova Scotia, New Brunswick, Manitoba, British Columbia, and Prince Edward Island, have each a separate parliament and administration. In each a Lieutenant-Governor presides; in each, as in the Dominion itself, there is a ministry responsible for its policy and executive acts to a parliament fully equipped for self-direction in local affairs.

1017. The provisions of the British North America Act were drafted in Canada and accepted by the Parliament in England without alteration. In the division of powers which they make between the government of the Dominion and the governments of the several provinces, they differ

very radically in character from the provisions of our own federal constitution. Our constitution grants certain specified powers to the general government and reserves the rest to the states; the British North America Act, on the contrary, grants certain specified powers to the provinces and reserves all others to the government of the Dominion. Among the powers thus reserved to the federal government is that of enacting all criminal laws.

1018. In Ontario, British Columbia, and Manitoba the legislature consists of but a single house.

1019. The government of the Dominion is for the most part a very faithful reproduction of the government of the mother country. The Crown is represented by the Governor-General, who acts in the administration of the colony as the Crown acts in the administration of the kingdom, through responsible ministers, and whose veto upon legislation is never used, though bills about whose bearing upon imperial policy there were serious doubts have been reserved for the approval of the queen in Council (that is of the ministry of the day in England). The Governor-General's cabinet is known as the Queen's Privy Council and consists (1897) of thirteen members, representing the majority in the popular house of the legislature, leading that house in legislation, and in all its functions following the precedents of responsible cabinet government established in England. The legislature consists of two houses, the Senate and the House of Commons. The Senate consists of eighty-one members nominated for life by the Governor-General,—that is, in effect, appointed by the Dominion ministers; for in the composition of the Senate, as in the creation of peers at home, the advice of the ministers is decisive. Each Senator must be at least thirty years of age, must reside in the province for which he is appointed, and must possess therein property, real or personal, to the value of four thousand dollars. The House of Commons consists of two hundred and thirteen members elected from the several provinces, for a term of five years, upon the basis of one representative for every 22,688 inhabitants, it being understood, however, that Quebec shall never have less than sixty-five members.

1020. The fourteen ministers composing the Council or cabinet are, a Prime Minister and President of the Council, a Secretary of State, a Minister of Trade and Commerce, Ministers of Justice, Marine and Fisheries,

Railways and Canals, Militia and Defence, Finance, Agriculture, Public Works, Interior, a Postmaster General, and two ministers without portfolios.

1021. The distribution of representation in the Dominion House of Commons is at present as follows: Ontario has 92 members, Quebec 65, Nova Scotia 20, New Brunswick 14, Manitoba 7, British Columbia 6, Prince Edward Island 5, and the North West Territories 4. The representatives are elected by a franchise based upon a small property qualification.

1022. The Parliament of the Dominion may be dissolved by the Governor-General upon the advice of the ministers and a new election held, as in England, when an appeal to the constituencies is deemed necessary or desirable.

1023. **The Governments of Australia.** — The governments of the Australian colonies are not different in principle, and are very slightly different in structure, from the government of Canada, except that in Australia the colonies stand apart in complete independence of each other, having as yet (1897) no formal federal bonds, no common authority nearer than the mother country. Alike in Queensland and in New South Wales there is a nominated Legislative Council and an elected Legislative Assembly; but in Queensland a property qualification is required of the electors who choose the lower house, while in New South Wales there is no such limitation upon the suffrage. In South Australia and Victoria both houses of the legislature are elected; in both a property qualification is required of the electors who choose the members of the upper house, and in Victoria a like qualification for membership of the upper house, also. In Victoria certain educational and professional qualifications are allowed to take the place of a property qualification. In each of the colonies the governor plays the part of a constitutional monarch, acting always upon the advice of ministers responsible to the popular chamber.

1024. **The Powers of the Colonial Courts.** — The action of the courts in the colonies on certain questions furnishes an instructive counterpart to the constitutional functions of our own courts. The colonial governments are conducted under written constitutions as our own governments are, though their constitutions are imperial statutes while ours are drafted by conventions and adopted by a vote of the people. And colonial courts exercise the

same power of constitutional interpretation that belongs to our own courts and that has often been carelessly assumed to be a peculiar prerogative of theirs. They test acts of legislation by the grants of power under which they are enacted, an appeal lying from them to the Judicial Committee of the Privy Council in England, which serves as a general supreme court for the colonies (secs. 924, 1071).

1025. The constitutionality of laws passed by the Dominion Parliament in Canada is considered first by the courts of the Dominion, going thence, if appealed, to the Privy Council.

1026. **The Crown Colonies.** — All those colonies which have not responsible self-government are classed as Crown colonies, colonies more or less completely directed by the Colonial Office in London. They range in organization all the way from mere military administrations, such as have been established in St. Helena and Gibraltar, through those which, like Trinidad and the Straits Settlements, have both a nominated Executive and a nominated Legislative Council, and those like Jamaica, whose nominated Executive is associated with a Legislative Council in part elected, to those like the Bahamas and Bermuda, in which the Councils are altogether elected, but which have no responsible ministry.

1027. **Powers of Colonial Governors.** — It is interesting to have the testimony of one of the most capable and eminent of English colonial administrators as to the relative desirability of the post of governor in a colony in which he is governor indeed, with no ministers empowered to force their advice upon him, and in a colony where he must play the unobtrusive part of constitutional monarch. Lord Elgin says with great confidence, in his *Letters*, that his position as governor of Canada was a position of greater official power than his position, previously held, as governor of Jamaica. He declares his unhesitating belief that there is "more room for the exercise of influence on the part of the governor" in such a colony as Canada, where he must keep in the background and scrupulously heed his ministers, than under any other arrangement that ever was before devised, although his influence there is of course "wholly moral — an influence of suasion, sym-

pathy, and moderation, which softens the temper while it elevates the aims of local politics."[1] This is but another way of stating the unquestionable truth that it is easier, as well as wiser, to govern with the consent and coöperation of the governed than without it, — easier to rule as a friend than as a master.

1028. **India.** — India stands in matters of government, as in so many other respects, entirely apart from the rest of the British Empire. It is governed, through the instrumentality of its Governor-General and his Council, directly from London by a member of the Cabinet, the Secretary of State for India. The Secretary of State is assisted by a Council of ten or more members appointed by the Crown from among persons who have resided or served in India. Acting under the Secretary of State and his Council in London, there is the Governor-General of India, who is also assisted by a Council of from five to six members, appointed by the Crown, — a Council which is first of all administrative, but which, when reënforced by from ten to sixteen additional members nominated by the Governor-General, has also the functions of a legislative council.

1029. The work of the Governor-General's Council is divided among some six or seven departments, one of which, that of foreign affairs, is generally kept in the hands of the Governor-General himself. These departments do not constitute a ministry; they are regarded simply as committees of the Council. The sessions of the reënforced or legislative council are held always in public.

1030. Not all of India is directly administered by the English government. There are numerous native states which act with substantial independence in local affairs, though under English overlordship and control. Such part of the vast territory as is administered directly by English officials is divided into provinces, of which the chief in importance are the so-called 'Presidencies' of Madras and Bombay. The governors of Madras and Bombay are appointed by the Crown and are assisted, as the Governor-General is, by two councils, adminis-

[1] *Letters and Journals of Lord Elgin*, ed. by Theodore Walrond, London, 1872, p. 126.

trative and legislative. Lieutenant-Governors, appointed by the Governor-General, and assisted by an administrative council only, preside over Bengal and the North West Provinces. The Lieutenant-Governors or Commissioners of the other provinces, who are also appointed by the Governor-General, are without councils.

1031. **Greater Britain.** — Greater Britain, the world of English colonies, differs very materially from Greater Greece, the widespread Hellas of the ancient world. Hellas was disintegrate: the Greeks carried with them, as of course, Greek institutions, but only to allow those institutions wide differentiation. In no way did Greek settlement signify race integration or a national nexus of rule. Englishmen, on the contrary, in English colonies, maintain a homogeneity and integration both of race and of institutions which have drawn the four parts of the world together under common influences, if they have not compacted them for a common destiny. Throughout Europe reformers have copied English political arrangements; the colonists have not copied them, they have extended and are perpetuating and perfecting them.

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XI.

THE GOVERNMENT OF THE UNITED STATES.

1032. **The English Occupation of America.** — The political institutions of the United States are in the main the political institutions of England, transplanted by English colonists to a new soil and worked out through a fresh development to new and characteristic forms. Though they now show so large an admixture of foreign blood, the main stock of the people of the United States is still of British extraction. For several generations the settlements of New England and the South contained scarcely any other element. In the North, in what is now Canada, and at the mouth of the Mississippi, there were French settlements; in Florida there were colonists from Spain; the Dutch had settled upon the Hudson and held the great port at its mouth; and the Swedes had established themselves on the Delaware: all along the coast there was rivalry between the western nations of Europe for the possession of the new continent. But by steady and for the most part easy steps of aggression the English extended their domain and won the best regions of the great coast. New England, Virginia, and the Carolinas were never seriously disputed against them; and, these once securely taken possession of, the intervening foreigner was soon thrust out: so that the English power had presently a compact and centered mass which could not be dislodged, and whose ultimate expansion over the whole continent it proved impossible to stay. England was not long in widening her colonial borders. The French power was crushed out in the North, the Spanish power was limited in the South, and the colonies had only to become free to develop energy more than sufficient to

make all the most competed-for portions of the continent thoroughly English, — thoroughly Anglo-American.

1033. **Adaptation of English Institutions.** — This growth of the English power in America involved a corresponding expansion of English institutions. As America became English, English institutions in the colonies became American. They adapted themselves to the new conditions and the new conveniences of political life in separate colonies, — colonies struggling at first, then expanding, at last triumphing; and without losing their English character gained an American form and flavor. Some institutions set up in New England the men who formed Plymouth had doubtless learned to know and to like while they were exiles in Holland; but they brought nothing with them that was not suitable to English habit.

1034. It would be misleading to say that the English planted states in America. They planted small isolated settlements, and these settlements grew in their own way to be states. The slow process was from local, through state, to national organization. And not everywhere among the English on the new continent was the form of local government at first adopted the same: there was no invariable pattern, but everywhere, on the contrary, a spontaneous adjustment of political means to place and circumstance. By all the settlements alike English precedent was followed, but not the same English precedent. Each colony, with the true English sagacity of practical habit, borrowed what was best suited to its own situation, and originated what it could not borrow. New England had one system, Virginia another, New Jersey and Pennsylvania still a third, compounded after a sort of the other two.

1035. **The New England Colonies.** — In New England the centre of government was always the town, with its church and schoolhouse and its neighborly cluster of houses gathered about these. The soil on the coast where the first settlers established themselves was shallow and slow to yield returns even to hard and assiduous toil; the climate was rigorous, with its long winters and bleak coast winds; every circumstance invited to close settlement and trade, to the intimate relationships of commerce and the adventures of sea-faring rather than to the wide-spreading settlements characteristic of an agricultural population.

1036. The first New Englanders, moreover, were most of them religious refugees. They had left the Old World to escape the Old World's persecutions and in order to find independence of worship; they were establishing a church as well as a community; they acted as organized congregations; their life was both spiritually and temporally organic. Close geographical association, therefore, such as was virtually forced upon them by the conditions of livelihood by which they found themselves constrained, accorded well with their higher social purposes. The church could be made, by such association, the vital nerve-centre of their union: the minister was the ruling head of the community, and church membership was in several of the settlements recognized as identical with citizenship.

1037. **The Separate Towns.** — The several parts of the New England coast were settled by independent groups of settlers. There was the Plymouth colony at Plymouth, and altogether distinct from it, the Massachusetts Bay colony at Salem and Charlestown and Boston. To the south of these, founded by men dissatisfied with the Massachusetts government, were Portsmouth, Newport, and Providence, in what is now Rhode Island. On the Connecticut river other wanderers from Massachusetts built Hartford and Windsor and Wethersfield. Saybrook, at the mouth of the Connecticut river, was settled direct from England; so also was the colony of New Haven, on the coast of Long Island Sound west of the Connecticut. From year to year the planting of towns went diligently on: almost every town became the prolific mother of towns, which either sprang up close about it and retained a sort of dependence upon it, or, planted at a distance, ventured upon an entirely separate life in the wilderness. (Compare secs. 67, 68, 70.)

1038. **Union of the Towns.** — Gradually the towns of each of the general regions mentioned drew together into the colonies known to later times, the colonies which were to form the Union. Plymouth merged in Massachusetts; Portsmouth, Newport, and Providence became but parts of Rhode Island; New Haven was joined to Connecticut. But at first these larger colonies were scarcely more than town leagues. It sometimes happened that each town retained unaltered its separate organization and its vir-

tual independence in the regulation of its own local affairs. In Rhode Island, particularly, their jealousy of each other and their reluctance to expose themselves to anything like a loss of perfect autonomy long kept the common government which they most of the time maintained at a balance between union and dissolution. In the other New England colonies the same influences manifested themselves, though in a less degree. The town system which everywhere prevailed was by its nature an extremely decentralized form of government: government, so to say, came to a separate head in each locality: and the chief vitality was in the self-governing units of each group rather than in the bonds which connected them with each other.

1039. **Forms of Town Government.** — The form of town government was everywhere such as it was quite natural that Englishmen should have set up. The names of the town officers were borrowed from the borough governments at home, and their duties were, as nearly as circumstances permitted, the same as the duties of the officers whose names they bore. The New England town was, at the same time, in many of its most important and characteristic features, rather a reversion to older types of government than a transplanted cutting of the towns which the settlers had left behind them in the England of the seventeenth century. There was in it none of the elaborated class privilege that narrowed the town governments of the England of that time. All the townsmen met in town-meeting and there elected their officers: those officers were responsible to them and always rendered careful account of their actions to the body which elected them. Generally the most important of these officers were called Selectmen, — men selected by the town-meeting to carry on the necessary public business of the community, — and these Selectmen stood in the closest relations of counsel and responsibility to the town-meeting. In the earliest times the franchise was restricted, in Massachusetts and New Haven at least, to those who were church members, and many were excluded by this rule from participation in the government; but even under such circumstances there was real and effective self-government. The towns lacked neither vitality nor energy, for they did not lack liberty. In the late days when great cities grew up, the simple township system had

to be abandoned in part; as the colonies expanded, too, they gained in energy and vitality as wholes, and their component parts, the towns, fell by degrees to a place of less exclusive importance in colonial affairs; but this basis of the township was never lost and has remained to the present day the foundation of local government in New England.

1040. **Colonial Organization.** — As the towns came together into the groupings which constituted the later colonies other areas of government naturally came into use. Townships were, for judicial purposes, combined into counties, and by various other means of organization a new nexus was given to the several parts of the now extended state. From the first the colonists had their 'general courts,' their central legislative assemblies representative of the freemen. To these assemblies went delegates from the several towns comprised in the colony. As the colonies grew, their growth but strengthened their assemblies: it was in the common ruling function of these that the union of the several parts of each colony was made real and lasting.

1041. The sheriffs of the counties of colonial Massachusetts were appointed by the Governor. The development of the county organization brought into existence, too, Justices of the Peace who met in Quarter Sessions, afterwards called 'General Sessions,' and who were the general county authority quite after the fashion of the mother country.[1]

1042. **The Southern Colonies.** — To this picture of the political institutions of colonial New England political and social organization in the Southern colonies offered many broad contrasts. The settlers in Virginia were not religious refugees: they had come out for a separate adventure in political, or rather in social, organization, but not for a separate venture in religion; and the coast they happened upon, instead of being rugged and bleak, was low and fertile, with a kindly climate, deep rivers, broad stretches of inviting country, and a generous readiness to yield its fruits in their season. They had been sent out by a Company (the 'Virginia Company' it was called) in England, to which the Virginia territory had been granted by the Crown, and they had no thought

[1] See *Town and County Government in the English Colonies of North America*, by Edward Channing, Johns Hopkins University Studies in Historical and Political Science, 2d Series, pp. 40–42.

but to live under the governors whom the Company had placed over them. They founded Jamestown some hundred miles above the mouth of the James river; but Jamestown was in no way like the New England towns, and it soon became evident that town life was not to be the characteristic habit of the colony. The rich soil invited to agriculture, the numerous rivers, full and deep, stood ready to serve as natural highways, and as the population of the colony increased it spread far and wide along the courses of the rivers.

1043. **Contrasts of Character.** — There was much more, besides soil and climate and the differing conditions of settlement, that made the Southern colonies unlike the colonies of New England. The New Englanders came for the most part out of the town and village population of the mother country: out of a very distinctly marked middle class with common motives and ideals: the more distinctly marked because most of them had had the same experiences and were of the same way of thinking in matters of religion. They naturally drew together for the sort of life they had left behind them over sea. The settlers of the Southern colonies, on the contrary, came from no single class and had no common habit, — except the general habit of the English race. They had been taken by fortune, as if at haphazard, out of the general mass of Englishmen at home, some gentle, some common, some bred to comfort, some not, all bent upon an independent life and carrying in their purpose the general ideals of their race. Prominent among these ideals, no doubt, was this, that a gentleman must live with space of good acres about him, a lord of the soil. The life of the Southern colonists was not more English than that of the New Englanders; but it was much more of the general pattern of English life, and more likely to keep near the models set up by English gentlemen outside the towns. There came a time, too, when Virginia received a strong infusion of Cavalier blood, and men came to her quiet lands who had the air and habit of courts, the ambitions of men of caste and estate; not a little of the color of English country life went out of them into all the ways of the broad tide-water properties; and the genial air told kindly upon the new fashions. Virginia grew more than ever like rural England; and followed the new ways

until the Scots-Irish came into the valley, to add another quality and the spice of variety. Alike in the North and in the South, climate, soil, and every natural quality of the region chosen fitted the instinct of the settlers. Both lived after their kind.

1044. **Expansion without Separation.** — There would appear to have been no idea of organic separation in this southern process of expansion, as there was so often in the spreadings of the New England colonists. Great plantations indeed grew up with an almost entirely separate life of their own, with their own wharves on the river fronts and their own direct trade with the outer world by vessels which came and went between them and England, or between them and the trading colonies to the north; but all this took place without any idea of organic political separateness. This diffused agricultural population, thus living its own life on the great rural properties which steadily multiplied in all directions, still consciously formed a single colony, living at first under the general government of the Company which had sent out the first settlers, and afterwards, when the Company had been deprived of its charter and possessions, under the authority of royal governors. Its parts hung loosely together, it is true, but they did not threaten to fall apart: the plan was expansion, not segregation.

1045. **Southern Colonial Society.** — The characteristics of the society formed under such circumstances were of course very marked. Slaves were early introduced into the colony, and served well to aid and quicken the development of the plantation system. A great gap speedily showed itself between the owners of estates and the laboring classes. Where slavery exists manual toil must be considered slavish and all the ideas on which aristocracy are founded must find easy and spontaneous rootage. Great contrasts of condition soon appeared, such as the more democratic trading communities of New England were not to know until the rise of the modern industrial organization; and the governing power rested with the powerful, propertied classes.

1046. **Government of Colonial Virginia.** — The government of colonial Virginia bore, in all its broader features, much the same character as the rural government of England. Organization was

effected through a machinery of wide counties, instead of by means of compacted townships. There was at the head of each county, under this first order of things, a Lieutenant whose duties corresponded roughly with those of the Lords Lieutenant in England. The other important executive officer of the county, too, in Virginia as in England, was the Sheriff. The Lieutenant was appointed by the Governor, was chief of the military (militia) organization of the county, and, by virtue of his membership in the Governor's Council, exercised certain judicial functions in the county. The Sheriff also was appointed by the Governor, upon the nomination of the Justices of the county. His duties an English sheriff would have regarded as quite normal. And added to these officers there was, as in England, a 'commission of the peace,' a body of justices or commissioners authorized to hold county court for the hearing of all ordinary cases not of grave import; authorized to levy the county taxes, to appoint surveyors of highways, to divide the county into precincts; empowered to act as the general administrative authority of the county in the management of all matters not otherwise assigned. The Episcopal church had the same official recognition in Virginia as in England and contributed the same machinery, — the machinery of the vestry, — to local government. Even the division of the 'hundred' was recognized, so close was the outline likeness between the institutions of the mother country and those of her crude child in the west. The system was undemocratic, of course, as was its model: "the dominant idea," as Mr. Ingle says, "was gradation of power from the Governor *downward*, not upward from the people."[1] The Justices, like the other officers of the county, were appointed by the Governor, and held only during his pleasure: the whole system rested upon a frank centralization. But still there was liberty. There was strong local feeling and individual pride to counteract the subserviency of the officers: those officers showed a more or less self-respecting independence in their administration; and at least the spirit of English self-government was kept alive.

[1] *Local Institutions in Virginia*, by Edward Ingle, Johns Hopkins University Studies in Historical and Political Science, 3d Series, p. 97 (continuous, p. 199).

1047. **Virginia's Colonial Assembly.** — The vital centre of the political life of the colony was her representative assembly. So early as 1619, only twelve years after the foundation of the colony (1607), the Virginia Company, then still in control, had called together in the colony, through its governor, an assembly representing the several plantations then existing, which were in this way treated as independent corporations entitled to a representative voice in colonial affairs. Later years saw the Assembly developed upon the basis of a representation by towns, hundreds, and plantations: and even after the governors sent out by the Company had been supplanted by royal governors this representative body, this House of Burgesses, as it came to be styled, continued to exist, and to wax strong in control. It was some time before the area of the colony justified that broader division into counties which was so characteristic of later days, and which changed very radically the system of representation. The 'towns' and 'plantations' of the early days seem to have been known, at any rate for purposes of representation, as 'boroughs,' and the representative house got its name, 'House of Burgesses,' before county representation grew up. The first Assembly, that of 1619, sat in joint session with the Governor and his Council, but the more fully developed assembly of later times sat apart as a distinct and independent body. It was this elective representation in the government of the colony which made and kept Virginia a vital political unit, with a real organic life and feeling.

1048. **The Constitutions of the other Southern Colonies** corresponded in the main with the constitution of Virginia. They, too, had the county system and the general representation in a central assembly, combined with governors and councils appointed by the Crown. All save Maryland. Her constitution differed from the others mainly in this, that in place of the king stood a 'proprietor,' to whom the fullest prerogatives of government had been granted.

1049. **The Middle Colonies** had a mixed population. New York had been New Netherland, and the Delaware had been first settled by the Swedes and then conquered by the Dutch. When the territory which was to comprise New York, New Jersey, Delaware, and Pennsylvania fell into the hands of the

English the foreign element was not displaced but merely dominated; and to a large extent it kept its local peculiarities of institution. For the rest, the English settlers of the region followed no uniform or characteristic method of organization. The middle colonies, though possessed of a rich soil, had also fine seaports which invited to commerce; their climate was neither so harsh as that of New England, nor so mild and beguiling as that of the southern colonies. Their people were of all sorts and origins. They built towns and traded, like the people of New England; they also spread abroad over the fertile country and farmed, like the people of Virginia. They did these things, moreover, without developing either the town system of New England or the plantation system of Virginia. Townships they had, but counties also; they were simple and democratic, like the New Englanders, and yet they were agricultural also, like the Virginians: in occupation and political organization, as well as in geographical situation, they were midway between their neighbors to the north and south.

1050. **The Charters: Massachusetts.** — The political relations of the colonies to the mother country during the various developments of which I have spoken were as various as their separate histories. The three New England colonies, Massachusetts, Rhode Island, and Connecticut, possessed charters from the king which virtually authorized them to conduct their own governments without direct interference on the part of the Administration at home. During the first years of English settlement on the American coast it had been the practice of the government in England to grant territory on the new continent to companies like the Virginia Company of which I have spoken, — grants which carried with them the right of governing the new settlements subject only to a general supervision on the part of the home authorities. The colony of Massachusetts Bay was established under such an arrangement: a Company, to which special privileges of settlement and government had been granted, sent out colonists who founded Salem and Boston; but the history of this Company was very different from the history of the Virginia Company. The Virginia Company tried to manage their colony from London, where the

members of the Company, who were active liberals and therefore not very active courtiers, presently got into trouble with the government and had both their charter and their colony taken away from them. The Massachusetts Company, on the other hand, itself came to America, and, almost unobserved by the powers in London, erected something very like a separate state on the new continent. Its charter was received in 1629; in 1630 it emigrated, governor, directors, charter, and all, to America, bringing a numerous body of settlers, founded Salem, Boston, and Cambridge, and put quietly into operation the complete machinery of government which it had brought with it. It created not a little stir in official circles in England when it was discovered that the Company which had been given rights of settlement on the New England coast had left the country and was building a flourishing set of independent towns on its territories; but small colonies at a great distance could not long retain the attention of busy politicians in London, and nothing was done then to destroy the bold arrangement. Fatal collision with the home government could not, however, it turned out, be permanently, or even long avoided by the aggressive, self-willed rulers of the Massachusetts Company. Many of the laws which they passed did not please the Crown, — particularly those which set up an exclusive religion and tolerated no other; they would not change their laws at the Crown's bidding; and, though the evil day was postponed, it came at last. In 1684 the contest between Crown and colony came to a head, and the charter of the Massachusetts Company was annulled. Before a change could be effected in the government, indeed, the king, Charles II., died, and at the end of the troublous reign of James II. the colonists quietly resumed their charter privileges; but in 1692 the government of William and Mary was ready to deal with them, and a new form of colonial organization was forced upon them. They were compelled to take a governor from the king; the royal governor appointed the judicial officers of the colony and controlled its military forces; and, although the colonists retained their assembly and through that assembly chose the governor's council, the old charter privileges were permanently lost.

1051. **The Connecticut Charter.** — Rhode Island and Connecticut were smaller and more fortunate. The town of Saybrook, at the mouth of the Connecticut river, had been founded under a charter granted to two English noblemen, and consisted, therefore, of immigrants direct from England; but Saybrook did not grow rapidly and proved a comparative failure. The successful and dominant settlement on the Connecticut was that which was founded higher up the river at Hartford, by men from Massachusetts who had neither charter nor any other legal rights, but who had simply come, settled, and made a written constitution for themselves. New Haven, westward of the river on the shore of the sound, had been established by a band of English immigrants equally without charter rights, but equally ready and able to construct a frame of government for themselves. Some thirty years after their settlement, the leaders of the 'Connecticut colony,' up the river, which meantime had become an extended cluster of towns, decided that it was time to obtain a charter. Accordingly they sent their governor, Winthrop, to England to procure one. He was entirely successful, much more successful than was pleasant to the settlers of the New Haven district; for he had obtained a grant which included their lands and colony and which thus forced them to become a part of 'Connecticut.' Saybrook had already been absorbed. The charter gave the colonists substantially the same rights of self-government that they had had under their own written constitution, adopted upon their first settlement; it was, in other words, just such a charter as Massachusetts then enjoyed. And, unlike Massachusetts, Connecticut kept her charter, kept it not only through colonial times to the Revolution, but made it at the Revolution her state constitution, and was content to live under it until 1818. Her shrewdness, her acts of timely concession, and her inoffensive size enabled her to turn away from herself each successive danger of forfeiture.

1052. **Rhode Island's Charter.** — Rhode Island was similarly protected by fortune and sagacious management. Roger Williams, the energetic leader of settlement in that region, obtained a charter from Parliament in 1644, which was confirmed in 1654, and replaced by a new charter, from Charles II., in 1663, the year

after Connecticut obtained its legal privileges through the instrumentality of Winthrop. As New Haven and Connecticut were joined by Winthrop's charter, so were the towns of the Rhode Island country united by the charters obtained by Williams, under the style 'Rhode Island and Providence Plantations,' — a title which is still the full official name of the state. The charter of 1663 was retained by the people of Rhode Island even longer than the people of Connecticut retained theirs. It was not radically changed until 1842.

1053. **Proprietary Governments.** — The governments of almost all the other colonies were at first 'proprietary'; those of Maryland, Pennsylvania, and Delaware remained proprietary until the Revolution. Maryland was granted to the Calverts, Lords Baltimore; Pennsylvania and Delaware were both included in the grant to William Penn; New York was bestowed upon James, Duke of York, upon whose ascension of the throne, as James II., it became an immediate province of the Crown; New Jersey, originally a part of New York, was first bestowed by the Duke of York on Lord John Berkeley and Sir John Carteret, was afterwards divided, then sold in part, and finally surrendered to the Crown (1702); the Carolinas and Georgia in the same way, given at first to proprietors, passed very soon into the hands of the royal government. New Hampshire, after several attempts to unite with Massachusetts, fell quietly into the status of a royal colony, without having had either a charter or even any regularly ordered proprietary stage of existence.

1054. Government under proprietors meant simply government by governors and councils appointed by the proprietors, with in all cases a right on the part of the people to exercise a substantial control over the government through representative assemblies. The private proprietors, like the great public proprietor, the Crown, granted charters to their colonies. The charter which Penn bestowed upon Pennsylvania is distinguished as one of the best-conceived and most liberal charters of the time; and under it his colony certainly enjoyed as good government as most of the colonies could secure.

1055. **Direct Government by the Crown**, which came in turn to every colony except Rhode Island, Connecticut, Pennsylvania, and

Delaware, involved the appointment of governors by the Crown, and also, everywhere except in Massachusetts, the appointment of the governor's council. It generally involved also the dependence of the colonial judiciary, and in general of the whole administrative machinery of government, upon the royal will; but it, nevertheless, did not exclude the colonists from substantial powers of self-government. Everywhere legislators disciplined governors with the effective whip of the money power, and everywhere the people grew accustomed to esteem the management of their own affairs, especially the control of their own taxes, matter-of-course privilege, just as much the inalienable right of Englishmen in America as of Englishmen in England.

1056. **Development of the Assemblies.** — It was, indeed, as a matter of course rather than as a matter of definite legal right that the powers of the colonial assemblies waxed greater and greater from year to year. Parliament would have been wise to continue the policy of neglect which had been the opportunity of the colonies in the development of their constitutional liberties. Left to themselves, they quickly showed what race they were of.

> As Burke said, in their justification, they "had formed within themselves, either by royal instruction or royal charter, assemblies so exceedingly resembling a parliament, in all their forms, functions, and powers, that it was impossible they should not imbibe some opinion of a similar authority. At the first designation of these assemblies, they were probably not intended for anything more (nor perhaps did they think themselves much higher) than the municipal corporations within this island, to which some at present love to compare them. But nothing in progression can rest on its original plan. . . . Therefore, as the colonies prospered and increased to a numerous and mighty people, spreading over a very great tract of the globe, it was natural that they should attribute to assemblies so respectable in their formal constitution some part of the dignity of the great nations which they represented. No longer tied to by-laws, these assemblies made acts of all sorts and in all cases whatsoever. They levied money, not for parochial purposes, but upon regular grants to the Crown, following all the rules and principles of a parliament, to which they approached every day more and more nearly. . . . Things could not be otherwise; and English colonies must be had on these terms, or not had at all. In the meantime neither party felt any inconvenience from this double legislature [the parliament of England, that is, and a colonial legislature], to which they had been formed by imperceptible habits, and old custom, the great support of all the gov-

> ernments in the world. Though these two legislatures were sometimes found perhaps performing the very same functions, they did not very grossly or systematically clash. . . . A regular revenue, by the authority of Parliament, for the support of civil and military establishments, seems not to have been thought of until the colonies were too proud to submit, too strong to be forced, too enlightened not to see all the consequences which must arise from such a system." [1]

1057. In such assertions of a right of parliamentary self-government it might be expected that the charter colonies would be most forward; but, as a matter of fact, such was not the case. Massachusetts was ever, indeed, very stubbornly and heroically attached to her liberties, but the royal colony of Virginia was not a whit behind her. The assemblies of the royal colonies, no less than those of the charter governments, early, and as if by an instinct and habit common to the race, developed a consciousness and practice of local sovereignty, which comported well enough, indeed, with a perfect loyalty, — long-suffering in respect of Navigation Acts and all like attempts of the mother country to regulate their place in the politics and commerce of the outside world, — but which was from the first prompt to resent and resist all dictation as to the strictly interior affairs of the settlements. And the same was true of the proprietary colonies, also. Maryland assumed the same privileges that Virginia insisted upon, and even Pennsylvania, with its population compounded of English, Dutch, and Swedes, manifested not a little of the same spirit of independent self-direction.

1058. **Development of Constitutional Liberty in the Colonies.** — There was, therefore, a comparatively uniform development of constitutional liberty throughout the colonies. Everywhere the same general causes were operative. The settlement and development of a new country gave to the elective governing bodies of the colonies a wide and various duty of legislative regulation; the newness of the country created everywhere substantially the same new conditions of social relationship; everywhere, and more and more as the years went on, there was a very general participation in communal and colonial affairs by the mass of

[1] "Letter to the Sheriffs of Bristol," *Works* (ed. Boston, 1880), Vol. II., pp. 232, 233.

the people most interested: and democratic institutions brought in their train equality of law and a widespread consciousness of community of interest. Each colony grew, the while, more and more vividly conscious of its separate political personality in its relations with the other colonies and with the ruling powers in England.

1059. **Political Sympathy of the Colonies.** — The substantial identity of institutional development in the several colonies appears in nothing more clearly or conclusively than in their close and spontaneous alliance against England at the Revolution. Despite very considerable outward differences of social condition and many apparent divergencies of interest as between colony and colony, they one and all *wanted the same revolution.* Almost without hesitation they ran together to coöperate by the same means for the same ends. They did not so much *make* a common cause as *have* a common cause from the first. The real concrete case of revolution, it happened, was made up between England and Massachusetts. To the politicians in the mother country it seemed possible to divide the colonies on grounds of self-interest. Apparently colonies so utterly different in every outward aspect, so strongly contrasted in actual economic condition as Massachusetts and Virginia, could easily be played off against one another. But we now know how little foundation of fact such a view had. Boston's trade was offered to Salem, her commercial rival, as a bait to catch Salem's acquiescence in the stringent Boston Port Bill which shut Boston off from all trade; but Salem would not have it. What was to prevent similar treatment of herself in the future? More striking still, distant Virginia sounded the call to revolution in behalf of Massachusetts. The contest was *political,* she clearly perceived, not economical, — a contest of principle, not a contest for any temporary interest or momentary advantage. From the point of view of politics Massachusetts' quarrel was Virginia's also. Virginia spoke at once, therefore, and as a leader, for combination, for a joint resistance to the aggressions of the home government, and at length for independence and a perpetual union between the colonies. For the shortest possible time did the struggle remain local; almost immediately it became 'continental.'

1060. **American as compared with English Constitutional Development.** — There was in this development of self-government in America a certain very close resemblance to the development of self-government in England; but there were also other points of very strong and obvious contrast between the institutional histories of the two countries. Both in England and in America the process of institutional growth was in the same direction. It began with small, hardy, deep-rooted local institutions, with small self-directing communities, and widened from these to national institutions which bound the constituent communities together in a strong and lasting central union. England began with her village communities and her judicial 'hundreds,' with the primitive communal institutions of the Teutonic folk; these were first gathered to a head in the petty kingdoms of the days of the Saxon Heptarchy; another step, and these one-time petty kingdoms were merely the counties of a wider union, and England was ready for the amalgamation of the Norman rule, — for the growth of her parliaments and her nationality. In like manner, the United States began with isolated settlements upon a long coast, settlements separate, self-contained, self-regulative; these in time merged in numerous petty colonial states; and finally these colonial states fitted themselves together into a national union.

1061. **Process of Growth in America Federation, in England Consolidation.** — But the means of integration were in the two cases quite diverse. American integration has been federal; English, absorptive, incorporative. The earlier stages of federation did not appear in the Southern colonies; because there the unity of the first settlement was generally not broken; the Virginia of the Revolution was but an expansion of the Jamestown settlement; growth by agricultural development was not disintegration like growth by town establishment. But in New England the process was federative from the first, finding its most perfect type, probably, in Rhode Island, whose town atoms drew so slowly and reluctantly together and so long stoutly resisted the idea that they had in any sense been absorbed or subordinated under the operation of the charters of 'Rhode Island and Providence Plantations.' What was at first mere confederation

between these smallest units, however, by degrees became virtual coalescence, and the absorbed towns finally formed but subordinate parts in the new and larger colonial units which drew together in the Continental Congresses. Between these larger units, these full-grown colonial states, union was from the first distinctly federative, matter of concession and contract. They were united in entirely voluntary association, as the Saxon kingdoms were not.

1062. **Conscious Development of Institutions in America.** — Throughout their development the colonies presented a marked contrast to English development in this, that the formulation of their institutions was conscious and deliberate. The royal colonies, like the proprietary and the charter colonies, exercised their rights of self-government under written grants of privilege from the Crown: their institutions grew within the area of written constituent law; from the first they had definite written 'constitutions' wherein the general fabric of their governments was outlined. Constitution by written law, therefore, became very early one of the matter-of-course habits of colonial thought and action. When they cast off their allegiance to Great Britain their self-constitution as independent political bodies took the shape of a recasting of their colonial constitutions simply. Rhode Island and Connecticut, as we have seen, did not even find it necessary to change their charters in any important particular: they already chose their own governors and officials as well as made their own laws. The other colonies, with little more trouble, found adequate means of self-government in changes which involved hardly more than substituting the authority of the people for the authority of the English Crown. But the charter, the written constituent law, was retained: the new governments had their charters which emanated from the people, as the old governments had had theirs given by the king. Popular conventions took the place of the Privy Council. The colonists were not inventing written constitutions; they were simply continuing their former habitual constitutional life.

1063. **English Law and Precedent.** — Whatever the form of colonial institutions, however, their substance and content were thoroughly English. In a sense, indeed, even the forms of colo-

nial constituent law may be said to have been English, since it was English practice which originated the idea and habit of giving written grants of privilege to distant colonies. The colonial law of Canada and Australia stands to-day in much the same relation to the law of the mother country that the law of the American colonies bore to the law which created them (sec. 1024). Within the constitutions of the colonial and revolutionary time, at any rate, English law and precedent were closely followed. The English common law has gone with Englishmen to the ends of the world. The English communities in America were but projected parts of the greater English community at home; the laws of private and personal relationship which obtained in England were recognized and administered also in the colonies; and when, at the time of the Revolution, the colonists developed out of their charters the constitutions under which they were to live as independent commonwealths their first care was to adopt this common law under which they had always acted. Important modifications were made, it is true, in the law thus adopted. It was purged of all class privilege, of all church prerogative, of all things incompatible with the simple democratic society of the new world; but no real break was made with the principles of English legal precedent and practice.

1064. Quite as naturally and quite as completely was English practice adhered to in the public law of the colonies and of the independent commonwealths into which they grew. The relations of the colonial legislatures with the colonial governors were substantially the relations of King and Parliament reproduced on a small scale, but with scarcely less earnestness and spirit. In all respects, except that of the erection of a responsible ministry representing and shielding the executive. the relations of the people to their governments suggest English precedent. The powers of the executive were, in small, the powers of the Crown. The courts were constituted as the English courts were, and followed the same rules of procedure. The English in America, being men of the same practical political race as Englishmen in England, struck out not a few lines of development of their own in suiting their institutions to the daily needs of a new civilization and to novel conditions of social organization; Ameri-

can politics were not long in acquiring in many respects a character peculiarly their own. But the manner of development was English throughout: there was nowhere any turning of sharp corners: there was nowhere any break of continuity. To the present day our institutions rest upon foundations as old as the Teutonic peoples.

1065. **Union: Preliminary Steps.** — How much of political precedent that was their own the colonists had developed appeared most distinctly when they came to put the timbers of their Union together in the days succeeding the Revolution. The colonies cannot be said to have framed any federative constituent law until 1777, when the Articles of Confederation were drawn up. Before that time they had coöperated without any determinate law of coöperation, acting rather upon the suggestions of international procedure than upon any clear recognition of corporate combination. Preparations for union there had been, and signs of its coming; but no more. For a period of forty years following the year 1643 the New England colonies had held together in a loose confederation against the Indians; in 1754 colonial delegates who had met at Albany for conference with representatives of the Six Nations discussed a premature plan of union; in 1765 delegates from nine of the colonies met at New York and uttered in behalf of all English Americans that protest against taxation by Parliament which gave the key-note to the revolutionary movement that followed; and in 1774 sat the first of the series of 'Continental Congresses' with which began American union. But in none of these steps was there any creation of organic union: that was to be the result of slow processes, and was to be effected only by the formulation of an entirely new body of law.

1066. **Separateness of the Colonial Governments.** It is very important, if a just view is to be formed of the processes by which the Union was constructed, to realize the complete separateness of the governments of the colonies. They all held substantially the same general relation to the English authorities; they had a common duty as towards the distant country from which they had all come out; but they were not connected with each other by any bonds of government on this side the sea. Each of the colonies had its separate executive officials, legislature,

and courts, which had no connection whatever with the officers, legislatures, and courts of any other colony. Their coöperation from time to time in meeting dangers which threatened them all alike was natural and spontaneous, but it was intermittent; it rested upon mere temporary necessity and had no basis of interior organic law. The colonists had many grounds of sympathy. Besides possessing the same blood and the same language, they entertained the same ideas about political justice; their dangers, whether proceeding from aggressions on the part of the French and Indians which threatened their lives, or from aggressions by Parliament which threatened their liberties, were common dangers: they were one and all equally interested in the successful development and liberal government of the new country with which they had identified themselves. But the motive of their endeavors was always the preservation of their internal and separate self-government; their liberties were historically coincident with their separate organization and rights as distinct governments. It was only by a slow and hard experience of the fatal consequences of any other course that the colonies were brought to subordinate themselves to a central authority which could go further than mere conference and command them. They saw from the first the necessity for coöperation, but they did not see from the first the absolute necessity for union. Very slowly, considering the swift influences of revolution amidst which they worked, and very reluctantly, considering the evident dangers of separation which daily looked them in the face, did they construct the union which was to deprive them of the fulness of their loved independence.

1067. **The Confederation.** — It was not until 1781 that a foundation of distinct written law was put beneath the practice of union; it was not till 1789 that the law of the union was made organic. In 1781 the Articles of Confederation were finally adopted which had been proposed by the Continental Congress of 1777. But those Articles gave no real integration to the confederated states: they were from the first a rope of sand which could bind no one. They did little more than legitimate the Continental Congress. Under them the powers of the Confederation were to be exercised by its Congress; its only executive or judicial organs were to be mere committees or agencies of the Congress; and it was in fact to have no real use for executive parts, for it was to have no executive rights. Its function was to be advice, not command. It hung upon the will of the states, being permitted no effective will of its own. The Articles were in effect scarcely more than an international convention.

1068. **The Articles of Confederation** formally vested the exercise of federal functions in a Congress just such as the Continental Congresses had been, — a Congress, that is, consisting of delegates from the several states, and in whose decisions the states were to have an absolutely equal voice. No state, it was arranged, should have her vote in the Congress unless represented by at least two delegates, and no state, on the other hand, was to be entitled to send more than seven delegates; whether she sent two or seven, however, her vote was to be a single vote, upon which her delegates were to agree. The government thus constituted was officially known as "The United States in Congress assembled." For the exercise of representative functions it was very liberally and completely equipped. To it the independence of the several states in dealing with foreign powers was entirely subordinated. It alone was to conduct international correspondence and sanction international agreements; it was to control the army and navy of the Confederation; it was to preside over federal finances, doing all the borrowing and all the spending that might be necessary for the purposes of the common government; it was to determine the value of current coin and the standards of weights and measures; it was to be arbitrator in disputes between the states; in brief, it was to be the single and dominant authority for all the graver common interests of the constituent states: its representative position was eminent and complete.

1069. **Weakness of the Confederation.** — But it was given absolutely no executive power, and was therefore helpless and contemptible. It could take no important resolution without the difficult concurrence of nine states, — a concurrence made all the more difficult by the fact that the removal of the pressure of the war with England very greatly abated the interest of the states in the functions of the central Congress, and led some of them to fail again and again to send any delegates to its sessions. Its chief executive agency was a committee of its members representing all the states (hence called the "Committee of States") and bound by the same hard rule of obtaining the concurrence of nine of its thirteen members to every important executive step. Above all, its only power to govern was a power to advise. It could ask the states for money, but it could not compel them to give it; it could ask them for troops, but could not force them to heed the requisition; it could make treaties, but must trust the states to fulfil them; it could contract debts, but must rely upon the states to pay them. It was a body richly enough endowed with prerogatives, but not at all endowed with powers. "The United States in Congress assembled" formed a mere consultative and advisory board.

1070. **Need of a Better Union.** — It was the fatal executive impotency of the Confederation which led to the formation of the

present stronger and more complete government. The old Continental Congresses had sufficed, after a fashion, to keep the colonies together so long as the pressure of the war continued. Throughout that war there had been, despite much indifference now and again on the part of some of the colonies to their duty, and of not a little positive dereliction of plain obligations, a remarkable degree of energy and unity of action among the confederated colonists. But when the pressure of the war was removed there was an ominous access of indifference, an ill-boding decrease of respect for plighted faith between the states. Signs fast multiplied both of the individual weakness of the states and of the growth of threatening jealousies between them. A war of tariffs began between neighbor states on the seaboard, notably between New York and New Jersey and between Virginia and Maryland. In Massachusetts there flared out, by reason of the poverty engendered by the war, a rebellion of debtors under Daniel Shays which it was for a moment feared the state authorities might find it impossible to cope with. It speedily became evident that, both for the sake of internal order and of interstate peace and goodwill, a real central government was needed. Central consultation would not suffice; there must be central government. The Confederation, therefore, was no real advance upon the old Continental Congresses. Before a single decade had passed over the new government with its fair-spoken Articles a new union had been erected and the real history of the United States begun.

1071. **The Constitution: Colonial Precedents.** — The present Constitution erects a very different government. It is the charter of a federal state, which has a commanding law and an independent power of its own, whose Constitution and law are the supreme law of the land. The Convention which framed the new Constitution met in Philadelphia in May, 1787, and fused together over the slow fires of prolonged debate the elements of English and colonial precedent which were to constitute the government of the United States. In the debates of that Convention during that memorable summer are to be read the particulars of the translation of English precedent into American practice made during the formative colonial period. Through the instrumen-

tality of the able men who composed that extraordinary assembly, the government of the United States was fitted out with the full experience of the colonies and of the revolutionary states.[1] It was arranged that the legislature of the new federal government should consist of two houses, not in direct imitation of the English system, whose House of Lords we did not have the materials for reproducing, but in conformity with an almost universal example set by the states. A single state furnished the precedent in accordance with which a real difference of character was given to the two houses. The lower house of the Connecticut legislature was constituted by an equal representation of the towns of the state, while her upper house, composed of the governor, lieutenant-governor, and twelve 'assistants,' represented her people at large: and Connecticut's example showed the Convention a convenient way of compromise by which they could reconcile the two parties within it which were contending, the one for an equal representation of the states in Congress after the absolute manner of the Confederation, the other for a proportional representation of the people. The Senate, it was agreed, should represent the states equally, the House of Representatives the people proportionally. The names Senate and House of Representatives were to be found already in use by several of the states. The single Executive, the President, was an obvious copy of the state governors, many of whom at that time bore the name of president; his veto power was to be found formulated ready to hand in the constitution of New York; a method of impeachment was already prepared in the constitutions of half a dozen states. Several states had also the office of Vice-President. With a fine insight into the real character of the government which they were constructing, the Convention provided that its judiciary should be placed, not under the President or the houses, but alongside of them, upon

[1] In describing the work of the Convention I follow here Professor Alexander Johnston's admirable exposition given in the *New Princeton Review* for September, 1887, under the title "The First Century of the Constitution." A convenient brief survey of the chief features of the state constitutions at the time of the formation of the present government of the Union may be found in Hildreth, Vol. III., Chap. XLIV.

a footing of perfect equality with them. A similar arrangement obtained under the state constitutions. The function of constitutional interpretation was nowhere explicitly conferred, but existed in the nature of the case. It, necessarily as old as written charters and constitutions, was an inevitable corollary to their fundamental proposition of a gift of limited powers. Written constituent law is by its very nature a law higher than any statute the legislature acting under it can enact, and by that law, as by an invariable standard, must the courts test all acts of legislation.[1] The colonial courts had once and again upon this principle questioned the validity of colonial legislation, and the Supreme Court of the United States had long had a prototype in the Judicial Committee of the Privy Council, whose function it was to hear appeals from the colonies, and whose practice it had been to pronounce against all laws incompatible with the royal charters (secs. 924, 1024).[2]

1072. When they came to equip Congress with powers, the Convention adopted the plan of careful enumeration. They set out the acts of government which were to be permitted to the legislature of the new government in a distinctly cast list of eighteen items. Even in doing this, however, they may be said to have been simply recording the experience of the Confederation. They were giving Congress the powers for lack of which the Congress of the Confederation had proved helpless and ridiculous. It was only when they came to construct the machinery for the election of the President that they left the field of American experience and English example and devised an arrangement which was so original that it was destined to break down almost as soon as it was put in operation.

1073. This general statement of the broader features of the selective work of the Convention will suffice for the present: other more particular references to state precedent and experience may be made in their proper connections in our further discussion of the government. I wish in these paragraphs only to fix the attention of the student, by way of preparation, upon the instructive fact that the work of the Convention was a work of

[1] See A. V. Dicey, *The Law of the Constitution*, Chap. III.; and J. Bryce, *The American Commonwealth*, Chap. XXIII.

[2] See Brinton Coxe, *Judicial Power and Unconstitutional Legislation.*

selection, not a work of creation, and that the success of their work was not a success of invention, always most dangerous in government, but a success of judgment, of selective wisdom, of practical sagacity, — the only sort of success in politics which can ever be made permanent.

1074. **Character of the New Government.** — It is one of the distinguishing characteristics of the English race whose political habit has been transmitted to us through the sagacious generation by whom this government was erected that they have never felt themselves bound by the logic of laws, but only by a practical understanding of them based upon slow precedent. For this race the law under which they live is at any particular time *what it is then understood to be;* and this understanding of it is compounded of the circumstances of the time. Absolute theories of legal consequence they have never cared to follow out to their conclusions. Their laws have always been used as parts of the practical running machinery of their politics, — parts to be fitted from time to time, by interpretation, to existing opinion and social condition.

1075. **Character of the Government Changes with Opinion.** — It requires a steady, clear-viewed, thoroughly informed historical sense, therefore, to determine what was at any given time the real character of our political institutions. To us of the present day it seems that the Constitution framed in 1787 gave birth in 1789 to a national government such as that which now constitutes an indestructible bond of union for the states; but the men of that time would certainly have laughed at any such idea, — and for the English race, as I have said, every law is what those who administer it think that it is. The men of 1789 meant to form "a more perfect union" than that which had existed under the Confederation: they saw that for the colonies there must be union or disintegration; they thought union needful and they meant to have it in any necessary degree. But they had no special love for the union which they set about consummating, and they meant to have as little of it as possible, — as little as might be compatible with wise providence in respect of the welfare of the new-fledged states. They were even more afraid of having too strong a central government than of having one which was too weak, and they accepted the new constitution offered them by the Convention of

1787 because convinced of the truth of the arguments urged by its friends to the effect that the union would be federal merely and would involve no real sacrifice of individuality or autonomy on the part of the states.

1076. **Early Sentiment towards the Union.** — It is astonishing to us of this generation to learn how much both of hostility and of indifference was felt for the new government, which we see to have been the salvation of the country. Even those who helped to make it and who worked most sincerely for its adoption entertained grave doubts as to its durability; some of them even, in despondent moments, questioned its usefulness. Philosophic statesmen like Alexander Hamilton supported it with ardent purpose and sustained hope; but for the average citizen, who was not in the least degree philosophic, it was at first an object of quite unexciting contemplation. It was for his state, each man felt, that his blood and treasure had been poured out: it was that Massachusetts and Virginia might be free that the war had been fought, not that the colonies might have a new central government set up over them. Patriotism was state patriotism. The states were living, organic persons: the union was an arrangement, — possibly it would prove to be only a temporary arrangement; entirely new adjustments might have to be made.

1077. **Early Tolerance of Threats of Secession.** — It is by this frame of mind on the part of the first generation that knew the present Constitution that we must explain the undoubted early tolerance for threats of secession. The Union was too young to be sacred; the self-love of the states was too pronounced to be averse from the idea that complete state independence might at any time be resumed. Discontent in any quarter was the signal for significant hints at possible withdrawal. As the new system lived on from year to year and from year to year approved itself strong and effective it became respected; as it gathered dignity and force regard was added to respect, until at last the federal government became a rallying centre for great parties moved by genuine national sentiment. But at first neither love nor respect shielded the federal authorities from the jealousies and menaces of the states. The new government was to *grow* national with the growth of a national history and a national sentiment.

1078. **Growth of the National Idea.** — The career and fate of the Federalist party very well illustrate the first state of opinion concerning the Union. The Federalist party was the party of the Constitution, — the party which had been chiefly instrumental in bringing about the adoption of the new frame of government. Immediately upon the inauguration of the present Union this party of its friends was put in charge of the new central body politic. It presided over the critical period of its organization, and framed the first measures which gave it financial credit, international consideration, security, and energy. But it soon became evident that the Federalists held views as to the nature of the new government which not all of those who had voted for the adoption of the Constitution were willing to sanction. They assumed for the federal authorities prerogatives of too great absoluteness, and seemed to many to be acting upon the idea that the purpose of the Constitution was to subordinate, and if need be sacrifice, state interests to the interests of the general government. Very speedily, therefore, they brought a reaction upon themselves, and were displaced by a party which felt that the limitations put by the Constitution upon federal authority ought to be very strictly observed. This new party, calling itself 'Democratic-Republican,' may be said to have been created by the injudicious excesses of the Federalists; and from this point of view the Federalist party may be said to have effected its own destruction. After its first national defeat it never again came into power. Rapidly in some places, slowly in others, it went utterly to pieces.

1079. But, although the Federalist party was destroyed, time worked in favor of its political conceptions. The Democratic-Republicans soon found that success in conducting the affairs of the federal government was, even for them, conditioned upon a very liberal reading of the authority conferred by the Constitution; and by slow degrees they drifted into practices of 'broad construction' quite as abhorrent to their own first principles as the much berated measures of the Federalists had been. But the Democratic-Republicans, — or the Democrats as they were before long more briefly called, — had the advantage of a corresponding change in public opinion. That, too, was steadily becoming nationalist in its tendencies.

1080. **Railroads, Expansion, and War aid the National Idea.** — So long as the people of one section of the country saw little or nothing of the people of the other sections, separateness of feeling and localness of view continued to exist and to exercise a controlling force; the majority of the people continued to put the states before the nation in their thoughts and to demand more or less punctilious regard for state prerogatives. But when railroads began to be built and to multiply; when people from all parts of the Union began to go out and settle the West together; when seeing each other and trading with each other began to make the people of all the states very much alike in most of the greater things of habit and institution, and even in most of the smaller things of opinion and conduct; when new states which had grown up in the West without any of the old conservative colonial traditions began to be admitted to the Union in increasing numbers, regarding themselves as born in and of the Union; when a second war with England and a hot struggle with Mexico had tested the government and strengthened a sentiment of national patriotism, — then at length it began to be very generally thought that the Federalists had been right after all; that the federal government ought to come first in consideration, even at the cost of some state pride.

1081. **Slavery stands in the Way of Nationality.** — What stood most in the way of the universal growth of this sort of national feeling was the great difference between the northern and southern portions of the Union caused by the existence of slavery in the South. So long as the laborers in the South were slaves and those of the North free men, these two sections could not become like one another either socially or politically, and could not have the same national feeling. The North and Northwest meant one thing when they spoke of the nation; while the South meant quite another thing. Each meant a nation socially and politically like itself. The two sections, therefore, rapidly became dissatisfied with living together under the same political system, and the secession so much talked about in various quarters in the earlier days of the Union at last became a reality. Inevitably came the war of secession, by means of whose fiery processes the differences of institution between North and South were to be swept utterly away.

1082. **Civil War completes the Union.** — The war wrought changes of the most profound character. Secession was prevented, the Union was preserved, and slavery was forever abolished; these were the immediate effects of the struggle. But the remoter results were even more important. They penetrated to the changing of the very nature of the Union, though the form of the federal government remained in all essential features unaltered. The great effect of the war was, that the nation was made, in social institutions, at last homogeneous. There was no longer any permanent reason why the South should not become like the rest of the country in character and sentiment. Both sections were brought to the same modes of life and thought; there was no longer any legal obstacle to their being in reality one great nation. The effort made in the war, moreover, to preserve the Union, and the result of the war in making the country at last socially homogeneous throughout, has made the federal government, as the representative of the nation, seem greater in our eyes than ever before, and has permanently modified in the profoundest manner the way in which all the old questions concerning constitutionality and state rights are regarded.

1083. **Present Character of the Union.** — It by no means follows that because we have become in the fullest organic sense a nation, ours has become a unitary government, its federal features merged in a new national organization. The government of the Union has indeed become permanent, the cherished representative, the vital organ of our life as a nation; but the states have not been swallowed up. Their prerogatives are as essential to our system as ever, — are indeed becoming more and more essential to it from year to year as the already vastly complex organism of the nation expands. But, instead of regarding the government of the United States and the government of a state as two governments, as our fathers did, we now regard them, — if we may make a matter-of-fact analysis of our working views in politics, — as two parts of one and the same government, two complementary parts of a single system. The value of the plan of government which our statesmen adopted at the first, the plan of functions divided between national and state authorities, has depreciated not a whit: we are only a little less anxious about

the clearness of the lines of division. The national government still has its charter, somewhat enlarged since the war, but substantially the same document as of old; and the national authorities must still confine themselves to measures within the sanction of that charter. The state governments, too, still have their charters, and still have valid claim to all powers not specifically delegated to the government of the Union. Liberal construction of the federal charter the nation wants, but not a false construction of it. The nation properly comes before the states in honor and importance, not because it is *more* important than they are, but because it is all important to them and to the maintenance of every principle of government which we have established and still cherish. The national government is the organic frame of the states: it has enabled, and still enables, them to exist.

1084. **Present Character of the Government of the Union.** — It is perhaps most in accordance with the accomplished results of our national development to describe the government of the United States, not as a dual government, but as a *double* government, so complete is the present integration of its state and federal parts. Government with us has ceased to be plural and has become singular, the *government* of the United States. Distinct as are its parts, they are not separate. The state and federal systems are so adjusted under our public law that they may not only operate smoothly and effectively each in the sphere which is exclusively its own, but also fit into each other with perfect harmony of coöperation wherever their jurisdictions cross or are parallel, acting as parts of one and the same frame of government, with an uncontested subordination of functions and an undoubted common aim.

1085. Although these two parts of our government are thus vitally united, however, thus integrated into what is in reality a single scheme of government, state law by no means depends upon federal law for its sanction. The Constitution of the United States and the laws and treaties passed in pursuance thereof are indeed the supreme law of the land, but their supremacy does not trench upon or displace the self-originated authority of the states in the immensely important sphere reserved to them. Although it is true, taking our system as a

whole, that the governments of the states are subordinate in our political order to the government of the Union, they are not subordinate in the sense of being subject to be commanded by it, but only in being less than national in their jurisdiction.

1086. **The States not Administrative Divisions but Constituent Members of the Union.** —The common and convenient distinction between central and local government furnishes here no appropriate ground of discrimination. A central government, as contradistinguished from a local government within the meaning of that distinction, is a government which prescribes both the constitution and the mode of action of the lesser organs of the system to which it belongs. This the governments of the states do with reference to the townships, the counties, the cities within their territories: these local bodies are merely administrative divisions of the states, agencies delegated to do the daily work of local government. But there is no such relationship between the federal government and the states. They are not administrative divisions but constituent members of the Union, coördinate with the Union in their powers, in no sense subject to it in their appropriate spheres. They are excluded, indeed, by the federal Constitution from the exercise of certain functions, but the great and all-important functions which they do exercise are not given them by that Constitution: they are exercised, on the contrary, upon the completest principles of self-direction. We may properly distinguish the government of a county and the government of a state by the distinction between local and central government, but not the government of a state and the government of the Union.

Character, Organs, and Functions of the States.

1087. **The States** properly come first in a description of the government of this country, not only because it was in conformity with state models and precedents that the federal government was constructed, but also and more particularly because the great bulk of the business of government still rests with the state authorities. The states still carry by far the greater part of the weight of the governing function, still constitute the ordinary

fountains of justice and of legal right, still stand nearest the people in the regulation of all their social and legal relationships. Like the Swiss Cantons (sec. 643), our states have given to the government which binds them together their own forms of constitution. Even more than the Cantons, our states have retained their right to rule their citizens in all ordinary matters without federal interference. They are the chief creators of law among us. They are the chief constituent units of our political system not only, but are also self-directive units. They make up the mass, the body, the constituent tissue, the organic stuff of the government of the country. "The federal government," as Tocqueville said, "is the exception; the government of the states is the rule." To them is intrusted our daily welfare, to the federal government only certain collective interests. Upon the character of the state governments depends the character of the nation in its several constituent members; upon the character of the federal government depends the character of the nation as a whole. If we are to begin our study of our institutions at the centre, at the heart of self-government, we must begin with the states.

1088. **The Law of the States: its Character.** — The law of each state consists of two great parts, (1) the Constitution, statutes, and treaties of the United States and (2) the constitution and statutes of the state. The Constitution, statutes, and treaties of the United States are the supreme law of the land not so much in the sense of being set above the constitutions and laws of the states as in the sense of being, by virtue of the principles of our public law, integral parts of the law of the states. The constitutions of several of the states explicitly declare the Constitution of the United States to be a part of their fundamental law: but such declarations are only formal recognitions of a principle now in all cases indubitable. On their legal as well as on their political side the two parts of our system have been completely integrated. Upon the state courts as well as upon the courts of the United States rests the duty of administering federal law. The federal Constitution is a negative portion of state law in respect of the limitations which it sets to the sphere of state activity; but the laws passed by Congress under the authority of that Constitution are also positive portions of state law, whose mandates all

officers of government, whether state or federal, are bound to obey.

1089. The constituted authorities of the states do not stand in the same relation, however, to the Constitution and laws of the Union that they bear to state law. Of state law they are the final interpreters, but of federal law they are only provisional interpreters. In acting upon federal law state officers always act subject to the supervision of the federal tribunals.

1090. **The functions of the state courts with regard to the interpretation of federal law** very forcibly illustrate the adjustments of our system. If in any case brought in a state court the question arise whether a certain state law involved in the case is or is not in violation of the Constitution of the United States, the court may freely give its judgment upon the question, and if its judgment be that the state law is *not* constitutional that judgment is conclusive. If, however, it should declare the law to be in agreement with the federal Constitution, its opinion may be cited to a federal tribunal for revision. The federal law is, thus, not regarded as a thing apart from the law of a state, too sacred to be handled by any but the federal courts, its specially constituted guardians: it is a part of state law and the state courts may declare and apply its principles. But in the last resort the federal courts must themselves shield it from a too liberal or too prejudiced judgment by state judges, who may very conceivably be interested to vindicate the statutes of their state as against any objections drawn from the law of the Union. Both for the sake of making it uniform and for the sake of keeping it supreme federal law must receive its final adjudication in its own courts.

1091. **Scope of State Law.** — A moment's thought suffices to reveal how very great a field of activity, how preponderant a part remains under our system to the states. The powers of the federal government seem great by enumeration. Besides being intrinsically powers of the greatest importance, they are made the more imposing in the Constitution by the fact of their being set forth in an exhaustive list. The *residuum* of powers that remains to the states, consisting as it does of unenumerated items, is vague, and because vague seems unimportant by comparison. A moment's examination of this *residuum* however, a moment's consideration of its contents, puts a very different face on the matter. It is worth while for the sake of an adequate understanding of the real division of powers under our government to

give to the powers remaining with the states something like the same setting forth that is given to those granted to the Union.

1092. **Legislative Powers of the Union.** — The Constitution of the United States grants to Congress first of all the power to lay and collect taxes, duties, imposts, and excises for the support of the government of the Union, the payment of its debts, and the promotion of the common defence and welfare, and also the power to borrow money on the credit of the United States; but these powers of taxation and borrowing belong also to the states, except that they must raise their revenues without resort to duties, imposts, and excises, the privilege of imposing these being reserved to the Union exclusively. The powers which distinguish the general government from the governments of the states are not these powers of raising money but these others: To control the monetary system of the country, to maintain post-offices and post-roads, to grant patents and copyrights, to deal with crimes committed on the high seas or against the law of nations, to shape the foreign relations of the country, to declare war and control the military forces of the nation, and to regulate commerce both with foreign countries and among the states. It is empowered also to establish uniform rules of naturalization and uniform laws concerning bankruptcy; but these powers do not belong to it exclusively. In case Congress does not act in these matters, the states may adopt laws for themselves concerning them. All the powers of the general government are plainly such as affect interests which it would be impossible to regulate harmoniously by any scheme of separate state action, and only such; all other powers whatever remain with the states.

1093. **Powers withheld from the States.** — Some powers, it is true, the Constitution of the United States expressly withholds from the states, besides those granted exclusively to the general government. No state may pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility; no state may, without the consent of Congress, lay any imposts or duties, keep troops or ships of war in time of peace, enter into any agreement with another state or with a foreign power, or engage in war unless actually invaded or in such immediate danger as will not admit of delay. But these prohibi-

tions obviously curtail scarcely at all the sphere which the states would in any case normally occupy within the scheme of federal union.

1094. **Powers left with the States.** — Compared with the vast prerogatives of the state legislatures, these limitations seem small enough. All the civil and religious rights of our citizens depend upon state legislation; the education of the people is in the care of the states; with them rests the regulation of the suffrage; they prescribe the rules of marriage, and the legal relations of husband and wife, of parent and child; they determine the powers of masters over servants and the whole law of principal and agent, which is so vital a matter in all business transactions; they regulate partnership, debt and credit, and insurance; they constitute all corporations, both private and municipal, except such as specially fulfil the financial or other specific functions of the federal government; they control the possession, distribution, and use of property, the exercise of trades, and all contract relations; and they formulate and administer all criminal law, except only that which concerns crimes committed against the United States, on the high seas, or against the law of nations. Space would fail in which to enumerate the particular items of this vast range of power; to detail its parts would be to catalogue all social and business relationships, to set forth all the foundations of law and order.

1095. A striking illustration of the preponderant part played by state law under our system is supplied in the surprising fact that only one out of the dozen greatest subjects of legislation which have engaged the public mind in England during the present century would have come within the powers of the federal government under the Constitution as it stood before the war, only two under the Constitution as it stands since the addition of the war amendments. I suppose that I am justified in singling out as these twelve greatest subjects of legislation the following: Catholic emancipation, parliamentary reform, the abolition of slavery, the amendment of the poor-laws, the reform of municipal corporations, the repeal of the corn laws, the admission of the Jews to Parliament, the disestablishment of the Irish church, the alteration of the Irish land laws, the establishment of national education, the introduction of the ballot, and the reform of the criminal law. Of these every one except the corn laws and the abolition of slavery would have been under our system, so far as they could be dealt with at all, subjects for state regulation entirely; and it was only

by constitutional amendment made in recognition of the accomplished facts of the war that slavery, which was formerly a question reserved for state action, and for state action alone, was brought within the field of the federal authority.[1]

1096. **Non-constitutional Provisions in State Constitutions.** — One of the most characteristic circumstances connected with our state law is the threatened loss of all real distinction between constitutional and ordinary law. Constitutions are in their proper nature bodies of law by which government is *constituted*, by which, that is, government is given its organization and functions. Private law, the regulation of the relations of citizens to each other in their private capacities, does not fall within their legitimate province. This principle is fully recognized in the construction of our federal Constitution, which is strong and flexible chiefly because of its great, its admirable simplicity and its strictly *constitutional* scope. But constitution-making in the states, especially in the newer states, has proceeded upon no such idea. Not only do the constitutions of the states go very much more into detail in their prescriptions touching the organization of the government; they go far beyond organic provisions and undertake the ordinary, but very different, work of legislative enactment. They commonly embody regulations, for example, with reference to the management of state property, such as canals and roads, and for the detailed administration of the state debt; they determine the amounts and sorts of property which are to be exempt from seizure for private debt; they formulate sumptuary laws, such as those forbidding the sale of intoxicating liquors; at a score of points they enter without hesitation or restraint the field usually reserved for the action of legislative bodies.

1097. **Distrust of Legislation.** — The motive is dissatisfaction with legislation, distrust of legislators, a wish to secure for certain classes of law a greater permanency and stability than is vouchsafed to statutes, which stand in constant peril of altera-

[1] Compare J. F. Jameson, *Introduction to the Constitutional and Political History of the Individual States*, Johns Hopkins University Studies in Historical and Political Science, 4th Series, p. 9 (continuous p. 189).

tion or repeal. A further motive is the desire to give to such laws the sanction of a popular vote. The practice has its analogies to the Swiss *Referendum* (secs. 656, 658, 699). It is the almost universal practice throughout the Union to submit constitutional provisions to a vote of the people; and the non-constitutional provisions which are becoming so common in our constitutions are virtually only ordinary laws submitted to popular sanction and so placed, along with the rest of the instrument of which they form incongruous parts, beyond the liability of being changed otherwise than through the acquiescence of the same ultimate authority. The practice perhaps discovers a tendency towards devising means for making all very important legal provisions dependent upon direct popular participation in the process of enactment.

1098. **The Objections to the practice** are as obvious as they are weighty. General outlines of organization, such as the Constitution of the United States contains, may be made to stand without essential alteration for long periods together; but, in proportion as constitutions make provision for interests whose aspects must change from time to time with changing circumstance, they enter the domain of such law as must be subject to constant modification and adaptation. Not only must the distinctions between constitutional and ordinary law hitherto recognized and valued tend to be fatally obscured, but the much to be desired stability of constitutional provisions must in great part be sacrificed. Those constitutions which contain the largest amount of extraneous matter, which does not concern at all the structure or functions of government, but only private or particular interests, must of course, however carefully drawn, prove subject to most frequent change. In some of our states, accordingly, constitutions have been as often changed as important statutes. The danger is that constitution-making will become with us only a cumbrous mode of legislation.

1099. In one or two of the states the Swiss *Referendum* has been more exactly reproduced, though not, so far as I know, in conscious imitation of Swiss example. Thus the Wisconsin constitution leaves it with the people to decide whether banks shall be established by state law or not; and the constitution of Minnesota makes certain railway laws and all appropriations from the internal improvement land fund of the state dependent for their validity upon the sanction of a popular vote.

1100. The objections to the *Referendum* are that it assumes a discriminating judgment and a fulness of information on the part of the people touching questions of public policy which they do not often possess, and that it lowers the sense of responsibility on the part of legislators.

1101. **Constitutional Amendments.** — The amendment of state constitutions, like the amendment of the federal Constitution, can be effected only by elaborate, formal, and unusual processes which are meant to hedge the fundamental law about with a greater dignity and sanctity than attaches to any other body of legal precepts. The theory of our whole constitutional arrangement is, that the people have not only, in establishing their constitutions, bound their agents, the governing bodies and officials of the states, but have also bound themselves, — have bound themselves to change the fundamental rules which they have made only by certain formal and deliberate processes which must mark the act of change as at once solemn and fully advised.

1102. **In England**, as we have seen (sec. 917), constitutional amendment is not distinguishable from simple legislation. Parliament may, by simple Act, change any, even the most fundamental, principle of government that the deliberate opinion of the nation wishes to see changed. Where the constitution consists for the most part of mere precedent, and for the rest of Acts of Parliament or royal ordinances simply, it may be altered as easily as precedent may be departed from. In England that is not easily. The great conservative force there is the difficulty with which Englishmen abandon established courses. **In France** constitutional amendment differs from ordinary legislation only in this, that the two chambers must sit together at Versailles, as a single National Assembly, when passing laws which affect the constitution (sec. 411). **In Germany** constitutional amendment differs from ordinary legislation only in the number of votes required for the passage of an amendment through the *Bundesrath*, in which fourteen negative votes will defeat it (secs. 499, 503). In the United States, on the contrary, constitutional amendment differs from ordinary legislation both in formal procedure and in the political powers called into action to effect it.

1103. **Preliminary Steps of Amendment.** — Legislatures, with us, cannot of themselves undertake any general revision of the fundamental law. In case a general revision of a state constitution is sought to be effected, the legislature is empowered to propose the calling of a popular convention to be chosen specially for the purpose; the question whether or not such a convention

shall be called must be submitted to the people; if they vote for its being summoned, it is elected by the usual suffrage; it meets and undertakes the revision, and then usually submits the results of its labors to the popular vote, which may either accept those results, or reject them and fall back upon the old constitutional arrangements.

1104. In many of the states a proposition for the calling of such a convention may be submitted to the people only if adopted by a two-thirds vote of both houses of the legislature. The new state constitution, adopted in South Carolina (1895) and in Delaware (1897) were not submitted to the popular vote, but were promulgated as law by the conventions which framed them. This method of adoption was once not uncommon; but it is now very unusual.

1105. **Proposal of Amendments.** — Legislatures may, however, themselves propose particular amendments to constitutional provisions. In some of the states a mere majority vote suffices for the preliminary adoption of amendments by the legislature, though in most states larger majorities, ranging from three-fifths of a quorum to two-thirds of all the elected members of each house, must be obtained. But in almost all cases popular sanction must follow: a vote of the people being made an indispensable condition precedent to the incorporation of an amendment in the fundamental law. In many states, indeed, amendments proposed thus by the legislature must be adopted by two *successive* legislatures, besides receiving the people's sanction, before they can become part of the constitution. In some a popular vote intervenes between the two legislative adoptions which must be had before the desired amendment is effected. In Delaware amendments may be made without a popular vote, if adopted by a two-thirds vote in two successive legislatures, a renewal of the representative house by election intervening.

1106. The details of these processes differ widely in different states. In Vermont only the senate can propose amendments, and it only at intervals of ten years. In Connecticut amendments can be originated only by the house of representatives. Various restrictions, too, are in many of the states put upon the number of clauses of the constitution to which amendments can be proposed at any single legislative session, the number of times amendments may be submitted to the people within a specified term of years, and the method to be followed in the popular vote

when more than one amendment is submitted. In most states, too, special popular majorities are required for the adoption of all constitutional changes.

1107. These processes of amendment have been found by no means so difficult as they seem. The habit of inserting in state constitutions enactments not properly belonging with constitutional provisions, and which must be subject to frequent alteration, has led to frequent appeals to the people for purposes of amendment, and has served to show how easy amendment may be made. So easy and normal, indeed, have appeals to the people in state affairs become that the constitution of New Hampshire goes the length of providing for the submission to the vote of the people every seven years of the question whether or not the state constitution shall be revised by a convention called for the purpose, while that of Iowa commands the submission of the same question to the people every ten years, that of Michigan every sixteen years; and the constitutions of New York, Ohio, Virginia, and Maryland direct its submission every twenty years.

1108. **Conflict of Laws.** — The plan of leaving to the states the regulation of all that portion of the law which most nearly touches our daily interests, and which in effect determines the whole structure of society, the whole organic action of industry and business, has some very serious disadvantages: disadvantages which make themselves more and more emphatically felt as modern tendencies of social and political development more and more prevail over the old conservative forces. When the Constitution of the Union was framed the states were practically very far distant from one another. Difficulties of travel very greatly restricted intercourse between them: being, so to say, physically separate, it was no inconvenience that they were also legally separate. But now that the railroad and the telegraph have made the country small both to the traveller and to the sender of messages the states have been geographically and socially compacted. Above all, they have been commercially and industrially knit together. State divisions, it turns out, are not natural economic divisions; they practically constitute no boundaries at all to any distinctly marked industrial regions. Variety and conflict of laws, consequently, have brought not a little friction and confusion into our social and business arrangements.

1109. **Detrimental Effects.** — At some points this diversity and multiformity of law almost fatally affect the deepest and most abiding interests of the national life. Above all things else, it

has touched the marriage relation, that tap-root of all social growth, with a deadly corruption. Not only has the marriage tie been very greatly relaxed in some of the states, while in others it retains its old-time tightness, so that the conservative rules which jealously guarded the family, as the heart of the state, promise amid the confusion to be almost forgotten; but diversities between state and state have made possible the most scandalous processes of collusive divorce and fraudulent marriage.

1110. It has become possible for either party to a marriage to go into another state, and, without acquiring there even a legal residence, obtain from its courts a routine divorce because the other party has not answered a summons published only in the state in which suit is instituted and therefore practically certain not to be brought to the notice of the person for whom it is intended. Under such a system a person may be divorced without knowing it, and it may be possible for a man to have different wives, or a woman different husbands, in several states at the same time.

1111. **In the Matter of Taxation** so great a variety of law obtains among the states as to preclude in part a normal and healthy economic development. Special taxes drive out certain employments from some states, special exemptions artificially foster them in others; and in many quarters ill-judged or ill-adjusted systems of taxation tend to hamper industry and exclude capital. So, too, in the matter of corporations diversity of state law works great confusion and partial disaster to the interests of commerce and industry, not only because some states are less careful in their creation and control of corporations than others, and so work harm to their own citizens, but also because loosely or unwisely incorporated companies created by the laws of one state may do business and escape proper responsibility in another state.

1112. **In the Criminal Law**, again, variety works social damage, tending to concentrate crime where laws are lax, and to undermine by diffused percolation the very principles which social experience has established for the control of the vicious classes. So, too, in laws concerning **debt**, special exemptions or special embarrassments of procedure here, there, and everywhere impair that delicate instrument, credit, upon whose perfect operation the prosperity of a commercial nation depends.

1113. **Proposals of Reform.** — It is in view of such a state of affairs, such a multiformity and complexity of law touching matters which ought, for the good of the country, to be uniformly and simply regulated throughout the Union, that various extensions of the sphere of the federal government have been proposed by sanguine reformers, who would have all interests which need for their advancement uniform rules of law given over to the care of Congress by constitutional amendment.

1114. **Evils of the Case easily exaggerated.** — The extent of the legal friction and confusion complained of may, however, easily be exaggerated. It is in most cases a confusion of detail and of procedure rather than of principle or substance, and has more exasperations for the lawyer than for the layman. Unquestionably there is vastly more uniformity than diversity. All the states have built up their law upon the ancient and common foundation of the Common Law of England, the new states borrowing their legislation in great part from the old. Nothing could afford clearer evidence of this than the freedom with which, in the courts of nearly every state in the Union, the decisions of the courts of the other states, and even the decisions of the English courts, are cited as suggestive or illustrative, sometimes also as authoritative, precedent. Everywhere, for instance, the laws of property rest upon substantially the same bases of legal principle, and everywhere those laws have been similarly freed from the burdens and inequalities of the older system from which they were derived. Everywhere there is the same facility of transfer, the same virtual abolition of all feudal characteristics of tenure, the same separation between the property interests of man and wife, the same general rules as to liens and other claims on property, the same principles of tenancy, of disposition by will, of intestate inheritance, and of dower. Everywhere, too, contracts, common carriage, sales, negotiable paper, and partnership rest upon similar principles of practically universal acceptance. We feel the conflicts, because we suffer under their vexations; while we fail to realize and appreciate the uniformities because they are normal and have come to seem matters of course. It must be acknowledged, moreover, that even within the area of irritation there are strong corrective forces at work, a

growing moral sentiment and a fashion of imitation, promising the initiation and propagation of reform. As the country grows socially and politically, its tendency is to compact, to get a common thought and establish common practices. As it compacts, likenesses will be emphasized, diversities pared and worn away.

1115. **Louisiana**, among the states, and New Mexico, among the territories, stand apart with a peculiar law of their own, unlike the law of the rest of the states, because based upon the civil law of France and Spain, which is Roman law filtered through the histories of the Romance nations. Inevitably, however, the laws of these exceptional communities have approximated in some degree to the legal systems of the rest of the Union; and they will draw still closer to them in the future.

1116. **Interstate Law: Commerce.** — In a country being thus compacted, thus made broader than its states in its feelings and interests, thus turned away from the merely local enterprise of its early industrial history to the national commerce and production of the present generation, state lines must coincide with the lines of very few affairs which are not political: there must be many calls for the adjusting weight of an authority larger than that of any single state. Most such interests, happily, are commercial in their nature, and with the regulation of interstate commerce Congress has always been charged. It was to give Congress this power, indeed, that the great constitutional convention was called: interstate commerce was one of the chief sources of the alarming friction between the states which marked that time of crisis. It is by the operation of this power that the great railroad systems of this country, and the endless telegraph lines, have come under the guardianship, and, so far as Congress has chosen, under the regulation of the federal government. Federal law cannot touch agencies of commerce which lie wholly within a single state; but there are nowadays very few such agencies, and the jurisdiction of Congress over commerce, where it does exist, is exclusive of all interference by the states. Federal law controls all navigable waters which constitute natural highways of interstate traffic or intercourse, whether directly or only through their connections; it extends to such waters, not only, but also to the control of the means by which commerce may cross them in its land passage, to the

construction, that is, of bridges over navigable waters for the facilitation of land traffic. It excludes every state tax or license law, every state regulation whatever, that in any way affects by way of restriction or control any movement of commerce or intercourse between the states.

1117. **Posts and Telegraphs.** — Directly supplementary to the power of Congress over interstate commerce is its power to establish post-offices and post-roads. This has been interpreted to bestow upon Congress the right to facilitate telegraphic intercourse between the states by taking measures to break down exclusive privileges granted by a state; and it must undoubtedly be taken as rounding out to a perfect wholeness the control of the general government over the means of communication between state and state.

1118. Of course, too, this is a jurisdiction which must necessarily advance with lengthening strides as the movements of our already vast commerce become yearly even wider still and more rapid. It has been made, indeed, to carry also a promise even of federal ownership of the telegraph systems of the country, and of a very much more extensive regulation of railway management than has yet been ventured upon. The most significant step yet taken was the creation, in 1887, of an Interstate Commerce Commission charged with the prevention of unjust discriminations in railroad rates either for freight or passage. This Commission has already become one of the most important judicial bodies of the nation, and illustrates a very important experiment in federal control (sec. 1351).

1119. **Citizenship.** — Citizenship in the United States illustrates the double character of the government. Whoever possesses citizenship at all is a citizen both of the United States and of the state in which he lives. He cannot be a citizen of the United States alone, or only of a state; he must be a citizen of both or of neither: the two parts of his citizenship cannot be separated. The responsibilities of citizenship, too, are both double and direct. Under our federal system punishment for the violation of federal law falls directly upon individuals, as does punishment for the violation of state law; the obligation of obedience is in both cases direct: every citizen must obey both federal law and the law of his own state. His citizenship involves direct relations with the authorities of both parts of the government of

the country, and connects him as immediately with the power of the marshals of the United States as with the power of the sheriff of his own county, or the constable of his own town.

1120. The population of the United States is probably less stationary in its residence than the population of any other country in the world, and frequent changes of residence have led to a great facilitation of the transfer of citizenship from one state to another. A very brief term of residence in a new home in another state secures the privileges of citizenship there: but in transferring his state citizenship a citizen does not affect his citizenship of the United States at all. The term of residence required for the acquirement of the privilege of suffrage varies from three months to two years and a half, but is in most cases one year.

1121. **Elements of Confusion.** — A very considerable amount of obscurity, it must be admitted, surrounds the question of citizenship in the United States. The laws of our states have so freely extended to aliens the right to hold property, and even the right to vote after a mere declaration of intention to become naturalized citizens (see sec. 1143), — have, in brief, so freely endowed aliens with all the most substantial and distinguishing *privileges* of citizenship, — that it has become extremely difficult to draw any clear line, any distinction not merely formal, between citizens and aliens. Of course if a person who is not formally naturalized exchanges residence in a state in which he was allowed the privileges of citizenship for residence in a state in which those privileges are denied him, he can complain of no injustice or inequality. The Constitution of the United States commands that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states"; but only federal law admits aliens to formal citizenship, and only formal citizenship can give to any one, wherever he may go, a right to the privileges and immunities of citizenship. The suffrage in particular is a privilege which each state may grant upon terms of its own choosing, provided only that those terms be not inconsistent with a republican form of government (sec. 1143).

1122. **Naturalization.** — Naturalization is the name given to the acquirement of citizenship by an alien. The power to prescribe uniform rules of naturalization rests with Congress alone, by grant of the Constitution. The states cannot make rules of their own in the matter, though they may, singularly and inconsistently enough, admit to the privileges of citizenship on what terms they please (sec. 1143). The national naturalization law requires that the person who wishes to become a citizen must apply to a court of law in the state or territory in which he

desires to exercise the rights of citizenship for formal papers declaring him a legal citizen; that before receiving such papers he must take oath to be an orderly and loyal citizen and must renounce any title of nobility he may have held; and that in order to obtain such papers he must have lived in the United States at least five years, and in the state or territory in which he makes application at least one year; and at least two years before his application he must have declared in court under oath his intention to become a naturalized citizen.

1123. It is not necessary for a person who became a resident of the United States three years before coming of age to make such a sworn declaration of his intention to become a citizen. If a man who has made such sworn declaration dies before taking out his papers of naturalization, his widow and minor children may become citizens by merely taking the necessary oath of citizenship at the proper time. The children of persons who become naturalized, if they live in the United States, and are under twenty-one years of age when their parents take the oath of citizenship, become citizens by virtue of the naturalization of their parents.

1124. **In Germany**, it will be remembered, the terms and conditions upon which foreigners are to be admitted to citizenship are also regulated by federal law (sec. 557); while in **Switzerland** citizenship in its fulness can be conferred only by cantonal law, though naturalization is regulated by federal provision (sec. 662). The European states have, however, very few of the problems of naturalization which confront and confound us in the United States. The whole world is not coming to them as it is coming to us.

1125. **Citizenship under a Confederation.** — The possession of a national naturalization law is one of the practical political features which distinguish our general government from the government of a mere confederation. The states which compose it are the only 'citizens' of a confederation: for the individual there is no federal citizenship; and the transfer by an individual of his citizenship from one state to another within the confederation is as much a mere matter of international comity as if the states were not bound together by any common law.

1126. **Central Governments of the States.** — The governments of the states depend for their structure and powers entirely upon written fundamental law, — upon documents which we may call popular charters. It was, as I have said, upon the models and precedents furnished by the governments of the thirteen original states that the federal government was constructed, and this was one of the features copied: the state governments, no less dis-

tinctly than the federal government, rest upon fundamental law based upon the explicit assent of the people or their representatives.

1127. A very great uniformity of structure is observable among the central governments of the states in all general features. One of the most obvious points of resemblance between them is the complete separation and perfect coördination of the three great departments of governmental action, — the legislative, the executive, and the judicial; and these are set apart and organized under the state constitutions with a very much greater particularity than characterizes the provisions of the federal constitution.

1128. **The State Legislatures: their Powers.** — The state constitutions supplement the Constitution of the Union, providing for the exercise of all powers not bestowed by the federal charter; and the legislatures of the states may be said, in general terms, to possess all law-making powers not given to Congress. But this is by no means a complete statement of the case. State constitutions contain strict limitations of power no less than does the Constitution of the United States. Some powers there are which are altogether withheld: which cannot under our system be exercised by any existing authority: which have been granted neither to Congress nor to the legislatures of the states. Such, for example, are the power to grant to any person or class of persons exclusive political privileges or immunities, the power to bestow hereditary privileges or honors, and the power to abridge in any way the equal rights to life, liberty, and property. These may safely be said, however, to be powers which no state legislature would in any case dream of exercising, inasmuch as they would have to be exercised, if exercised at all, in the face of a public opinion which would certainly refuse reëlection to any legislator who should violate the principles of republican government so strenuously worked out in our history, from Magna Charta down, and now so warmly cherished by all classes of our people that no denial of them could stand upon our statute books a single twelve-month. These are at most limitations put upon reaction.

1129. **Limitations of Length of Session, etc.** — There are other limitations, however, of a very different character contained in our state constitutions: limitations meant especially to control

the action of legislatures within the sphere of their proper and undoubted powers, and unquestionably based upon a general distrust of the wisdom, if not of the honesty, of legislators. Thus our constitutions very commonly forbid all private or special legislation, confining legislatures to the passage of general laws applying uniform rules to all persons and all cases alike. They limit, moreover, in very many cases, the length and frequency of legislative sessions, providing that the legislature shall convene, for instance, only once in every period of two years, and shall continue its biennial session for not more than a certain number of days, except under special or exceptional conditions, when extra sessions may be called by the governor or regular sessions extended by a special two-thirds or three-fifths vote. Many constitutions contain, also, minute provisions concerning the conduct of legislation, forbidding the introduction of bills later than such and such a day of a limited session, prescribing the general form of bills, limiting their subject-matter to a single object each, and even commanding the manner of their consideration.

1130. **Other Limitations.** — More than this, as we have seen, there are certain classes of legislative provisions which have been removed beyond the cognizance of legislatures by being put into the constitutions themselves: such as exemptions of certain classes of property from seizure for private debt (generally called "homestead exemptions"), 'prohibition' provisions, etc. The embodiment of such measures in constitutions is intended, as I have said (secs. 1096, 1097), to put them beyond legislative interference, — is a limitation of the same indirect sort as a Bill of Rights. It is usual, also, for our state constitutions to limit the power of legislatures to create corporations, by provisions which direct the passage of general laws of incorporation to be applied in a formal administrative manner by the courts, to which applications for incorporation are to be made.

1131. The period to which the duration of legislative sessions is restricted varies, when imposed, from forty days (Colorado, Georgia) to ninety days (Maryland and Virginia), the most common period being sixty days. It is noteworthy that only four of the original thirteen states have put a restriction upon the sessions of their legislatures. Eight of these thirteen have, however, on the other hand, restricted either wholly or in

part the power to pass private or special legislation, — the power, that is, to make special rules for special cases or for particular individuals. It is nevertheless true that it is in the newer states, for the most part, that the strictest and most extensive limitations of legislative power are to be found.

1132. **State Legislatures not Sovereign Bodies.** — It will thus be seen that our state legislatures are not in any sense 'sovereign' bodies. There is a certain serviceable clearness of view to be had by regarding the state governments as, in their legal aspect, like corporations. Their legislatures are *law-making bodies* acting within the gifts of charters, and are by these charters in most cases very strictly circumscribed in their action. It is this fact which gives so unique a place of power under our system to the courts, the authoritative interpreters of the fundamental law to which all legislation and all executive action must conform.

1133. **Legislative Organization.** — In every state the legislature consists of two houses, a senate and house of representatives, and in most of the states the term of senators is four years, that of representatives two years, one-half of the senate being renewed every two years at the general elections. There is no such difference in character, however, between the two houses of the state legislatures as exists between the Senate and the House of Representatives of the United States. Connecticut, as we have seen (sec. 1071), furnished the suggestion upon which the framers of the federal Constitution acted in deciding upon the basis and character of representation in the two federal houses; for in the Connecticut legislature of that time one house represented the towns, as the confederate units of the state, while the other represented the people directly. Even Connecticut has now abandoned this arrangement, however, and in almost all the states representation in both houses is based directly upon population, the only difference between the senate and house being that the senate consists of fewer members representing larger districts. Often, for instance, each county of a state is entitled to send several representatives to the lower house of the legislature, while several counties are combined to form a single senatorial district.

1134. **Reasons for Two Houses in State Legislatures.** — There is, consequently, no such historical reason for having two houses in the states as exists in the case of the federal government. The object of the

federal arrangement is the representation of the two elements upon which the national government rests, namely, the popular will and a federal union of states. The state legislatures have two houses simply for purposes of deliberateness in legislation, in order, that is, that legislation may be filtered through the debates of two coördinate bodies, representing slightly differing constituencies, though coming both directly from the people, and may thus escape the taint of precipitation too apt to attach to the conclusions of a single all-powerful popular chamber. The double organization represents no principle, but only an effort at prudence.

1135. The reason for our having double legislatures cannot, however, be so simply explained. It is compounded of both deliberate and historical elements. Its historical grounds are sufficiently clear: the senates of our states are lineal descendants of the councils associated with the colonial governors, though they now represent a very different principle. The colonial councils emanated from the executive, and may be said to have been parts of the executive, while our senates emanate from the people. Then, too, there was the element of deliberate imitation of English institutions. One hundred years ago England possessed the only great free government in the world; she was, moreover, our mother land, and the statesmen who formed our constitutions at the revolution naturally adopted that English fashion of legislative organization which has since become the prevailing fashion among all liberalized governments. Possibly, too, they were influenced by more ancient example. The two greatest nations of antiquity had had double legislatures, and, because such legislatures existed in ancient as well as in modern times, it was believed that they were the only natural kind.

1136. **Historical Precedents.** — Greeks, Romans, and English alike had at first, it is true, only a single law-making body, a senate representing the elders or nobles of the community, associated with the king, and, because of the power or rank of its members, a guiding authority in the state. In all three nations special historical processes produced at length legislatures representing the people also; popular assemblies were, on one plan or another, coördinated with the aristocratic assembly, and presently the plan of an aristocratic chamber and a popular chamber in close association appeared in full development. We copied the English chambers when they were in this stage of real coördination; before her legislature had sustained that great change, which Greece and Rome also had witnessed, whereby all real power virtually came to rest again with a single body, the popular assembly.

1137. **Terms of Senators and Representatives.** — Among the older states of the union there is a more noticeable variety of law as to the *terms* of senators and representatives than is to be found in the constitutions of the newer states. In Massachusetts and Rhode Island, for instance, the term of both senators and representatives is a single year only.

In New Jersey senators are elected for three years, one-third of the senate being renewed every year at the election for representatives, whose term in New Jersey is but one year. A few of the states, however, both new and old, limit the term of senators to two years, the usual term of representatives; while in Louisiana representatives are given the term usually assigned to senators, namely, four years.

1138. **Names of the Houses.** — There is some variety among the states as regards the name by which the lower house of the legislature is known. In New York the popular house is called "the Assembly"; in Virginia, the "House of Delegates"; in New Jersey, the "General Assembly," — a name usually given in most of the states to the two houses taken together.

1139. **The Qualifications** required of senators and representatives vary widely in the different states, but not in any essential point of principle. It is universally required, for example, that members of the legislature shall be citizens; it is very generally required that they shall be residents of the states, sometimes that they shall be residents of the districts for which they are elected; and it is in almost all cases required that a member of the legislature shall have reached a certain age. Variety appears in these provisions only in respect of details, as to the length of time citizenship or residence shall have been acquired before election, the particular age necessary, etc. The age required varies in the case of senators from twenty-one to thirty years, in the case of representatives from twenty-one to twenty-five.

1140. **Legislative Procedure.** — The same general rules of organization and procedure are observed in the constitution and business both of Congress and of the state legislatures. The more numerous branch is in all cases presided over by an officer of its own election who is called the 'Speaker'; and the senate sits under the presidency, generally, of a *Lieutenant-Governor*, who occupies much the same place in the government of the state that the Vice-President of the United States occupies in the national government. He is contingent substitute for the governor. In nineteen of the states it is required that the votes of a majority, not of a *quorum* merely, but of the full number of members elected to each house shall be necessary for the passage of a bill.

1141. **Standing Committees.** — The houses of the state legislatures, too, being separated from the executive in such a way as to be entirely deprived of its guidance, depend upon standing committees for the preliminary examination, digestion, and preparation of their business, and allow to these committees an almost unquestioned command of the time and the conclusions of the legislature. The state legislatures of the early time served as models for Congress. They and the legislatures of the later states, made like them, have retained substantially their first plan of organization, following the rules of parliamentary practice universally observed among English-speaking peoples; and they and Congress alike have had in the main the same development. As they have grown larger they have grown more dependent upon their advisory parts, their committees.

1142. In several states the constitutions themselves command the reference of all bills to committees and forbid the passage of any measure which has not been referred and reported upon.

1143. **The Suffrage.** — The suffrage is in all the states given by constitutional provision to male citizens twenty-one years of age; but it does not in all the states stop there. Several of the states extend the privilege of voting also to every male resident of foreign birth who is twenty-one years of age and has declared his intention to become a naturalized citizen; and several of the states grant it to every male citizen or '*inhabitant*' of voting age. The laws of almost all the states require residence in the state for a certain length of time previous to the election in which the privilege is sought to be exercised (the period varies all the way from three months to two years and a half), as a condition precedent to voting; most require a certain length of residence in the county also where the privilege is to be exercised; some a certain length of residence in the voting precinct. Many states require all voters to have paid certain taxes; in Delaware they are required to have paid a fixed registration fee; but no state except Rhode Island and South Carolina has a property qualification properly so-called. In South Carolina it is required that each voter shall be able

to read and write, *or,* if illiterate, shall own property valued at three hundred dollars.

1144. In Connecticut, Delaware, Massachusetts, and Mississippi the suffrage is confined to those who can read the constitution or the laws of the state. It is common, of course, throughout the country to exclude criminals, insane persons, and idiots; and in several states the privilege is withheld from those who bet on elections. In Florida betting on an election not only excludes from the election in connection with which the offence is committed, but is punished, upon conviction, by entire and permanent disfranchisement. A number of states also shut out duellists. In most of the states a plurality vote at the polls is sufficient for election; but Vermont, Rhode Island, and Connecticut require election by a majority of those voting.

1145. **Women** are accorded the privilege of voting in school elections in a number of states, and in a still larger number they are made eligible to be elected to school boards. Several states have extended the franchise to them in municipal elections; and, although the constitutions of most of the states declare the suffrage to be restricted to males, Colorado, Wyoming, and Washington have conferred it upon women in all elections.

1146. **The Ballot**, or voting paper, is throughout all the states the instrument of voting, and a large majority of them have now (1897) adopted the so-called Australian ballot system, by which voters are secured a complete privacy in the preparation of the voting papers and in the casting of their votes when prepared.

1147. **The State Courts.** — A very great variety exists among the laws of the several states regarding the constitution, functions, and relative subordination of the courts. A general sketch of the state courts must, therefore, be made in very broad outline. Perhaps in this department of state law, as in others, there may be said to be, despite a bewildering variety of detail, sufficient unity of general feature to warrant a generalized description, and to render unnecessary the unsatisfactory expedient of choosing the institutions of a single state as in some broad sense typical, and describing them alone.

1148. The courts of our states are in no sense organs of federal justice, as the courts of the German states are (sec. 556). They have an entirely independent standing and organization and an entirely independent jurisdiction. Their constitution and procedure are in no way affected by federal law, — except of course by way of limitation; — their sphere is a

sphere apart. The series of courts in each state, therefore, is complete. Every state has its supreme court, as well as its inferior tribunals, and appeals lie from the state courts to the courts of the United States only in cases involving federal law or in cases where the character of the parties to the suit does not give any state court complete jurisdiction (secs. 1090, 1306).

1149. One of the most characteristic features of our state courts is what I may call their *local attachment.* In most cases the judges are not appointed by any central authority but are elected by the voters of the district or circuit in which they hold court; they, like members of legislatures, may be said to have 'constituents.' Their responsibility is thus chiefly a responsibility to the electors, a popular rather than an official responsibility. The courts are held together in a common system and to a common duty only *by law,* therefore, and not by discipline or official subordination to superior judicial authorities. The courts may be said to be local rather than central organs; they are integrated only *in opinion,* — only by the course of appeal, the appellate authority of the higher over the lower courts in points of law.

1150. This *localization* of the organs of government, in their origin as well as in their functions, is a general characteristic of American political organization, — a characteristic which appears most conspicuously in the arrangements of local government, which is, as we shall see, not so much organized as left to organize itself under general statutes, for whose enforcement no central administrative machinery is provided.

1151. **Common Law Courts.** — There are, usually, four grades of jurisdiction in the judicial systems of the states, with four grades of courts corresponding. There are generally (1) *Justices of the Peace,* who have jurisdiction over all petty police offences and over civil suits for trifling sums; who conduct preliminary hearings in cases of grave criminal offence, committing the accused, when there is *prima facie* proof of guilt, for trial by a higher court; and who are, in general terms, conservators of the peace. They act separately and have quite lost the high judicial estate which still belongs to the English Justices, from whom they take their name. Their decisions are in almost all cases subject to appeals to higher courts.

1152. Mayor's courts in the towns are generally the same in rank and jurisdiction, so far as criminal cases are concerned, as the courts of Justices of the Peace.

1153. (2) **County or Municipal Courts**, which hear appeals from Justices of the Peace and from Mayor's courts, and whose own original jurisdiction is one step higher than that of the Justices, including civil cases involving considerable sums, and criminal cases generally not of the gravest character.

1154. Often, however, courts of this grade, especially the municipal courts of the larger towns, are given a much higher jurisdiction and are coördinated in some respects with courts of the next higher grade, the Superior Courts. In New York, New Jersey, and Kentucky the county courts retain the English name of Quarter Sessions.

1155. (3) **Superior Courts**, which hear appeals from the county and municipal courts, and generally from all inferior courts, and which are themselves courts of high original jurisdiction of the most general character in both civil and criminal cases. They may be said to be the general courts which give to the courts of lower grade their name of 'inferior.' County and municipal courts, as their names imply, sit only for certain small districts; but the districts over which superior courts have jurisdiction usually cover a wide area, necessitating the sitting of each such court in several places in succession. In other words, superior courts are generally circuit courts, and in many states bear that name.

1156. 'Circuit courts' is, indeed, the most generally used name for courts of this grade, that is, for the principal courts of the state; though in almost as many states they are called 'district courts.' In most of the states these courts have special judges of their own; but in Maine and New Hampshire they are held by the judges of the supreme court on circuit.

1157. In some states civil is separated from criminal jurisdiction in this grade, and distinct courts are created for each. Thus in Texas there are District courts for civil causes, District Criminal courts for criminal cases. In Pennsylvania courts of Quarter Sessions are the courts of general criminal jurisdiction, as in England, civil causes going to the courts of Common Pleas. Delaware has criminal courts called courts of Gaol Delivery.

1158. (4) **Supreme Courts**, which in most of the states have no original jurisdiction at all, but only appellate jurisdiction, hearing

appeals in all classes of cases (except such as involve only trifling offences or small sums of money) from the superior courts and from various inferior courts.

1159. (5) In several states there are *supremest* courts above the 'supreme.' Thus in New York there is a Supreme Court, which has its Appellate Division; the Appellate Division has four several parts or sections which sit and hear appeals in the four judicial districts into which the state is divided; and over all there is a Court of Appeals, a court of general revision. In New Jersey there is a supreme court above the circuit, which is itself of high appellate jurisdiction, and a Court of Errors and Appeals above the supreme; in Louisiana the order is reversed and there is a supreme court above a court of appeals; in Illinois a supreme court above certain district "appellate courts"; and in Kentucky a somewhat similar arrangement prevailed until the Constitutional revision of 1891. In Texas there are two coördinate supreme courts: one, called the supreme, for the hearing of civil cases only, the other, called the court of appeals, for the hearing of criminal cases and of civil cases brought up from the county courts.

1160. The name 'court of appeals' is found also in Maryland, Virginia, and West Virginia.

1161. In five of the original states (New Hampshire, Massachusetts, Rhode Island, New York, New Jersey), and in Maine, the supreme courts have, anomalously enough, *original* as well as appellate jurisdiction in all cases; but in the newer states such an arrangement is never found. In the case of New York, however, it is hardly accurate to say that the Supreme Court has original jurisdiction, but rather that its judges have, acting separately, and subject to the oversight of the several sections of the 'Appellate Division.' (Compare sec. 1159.)

1162. In several of the larger cities of the country there are complete sets of courts, reproducing the state judiciary in small. Thus in Baltimore, for example, there are city courts from the lowest grade up to a 'Supreme Bench of Baltimore City.'

1163. **Courts of Equity.** — 'Equity' is defined, under the legal systems of England and the United States, as "that portion of remedial justice which is exclusively administered by a court of equity, as contradistinguished from that portion of remedial justice which is exclusively administered by a court of common law" (Story). In other words, it is that portion of remedial justice which was administered in England by the Chancellors, who were 'the keepers of the king's conscience,' and from whose court, as if from the king's sense of justice, there issued writs from time to time for the remedy of wrongs for which the common law made

no adequate provision (secs. 847, 1423). The early Chancellors were ecclesiastics imbued with Roman law as it had come down through the medium of the canon law, and both in their hands and in those of their lay successors of later times, who were the heirs of their principles and prerogatives, equity law and procedure became a very different thing from the law and procedure of the common law courts.

1164. **Fusion of Law and Equity.** — As time has gone on equity and law have been largely fused, even in England, just as the *jus gentium* and the *jus civile* became merged in the development of the Roman law (secs. 265–270, 274, 280, 281); and in most of the states of the Union the same courts exercise both equitable and common law jurisdiction. In several states the whole procedure even, in both jurisdictions has been made practically identical, and law is hardly distinguishable from equity. Generally, however, the distinctive procedure at least has been preserved, and only courts of the superior and supreme grades have been given equitable jurisdiction, — jurisdiction, that is, over cases in which the remedy is equitable. In Alabama, Delaware, Michigan, Mississippi, New Jersey, Tennessee, and Vermont there are still special chancery courts.

1165. Equity processes of trial differ from common law processes, outwardly, chiefly in the fact that the testimony is written instead of oral, and that decisions of fact as well as of law rest with the judge instead of with a jury. For its special subject-matter equity jurisdiction generally embraces such matters as trusts, mistakes, frauds, etc., — matters hardly tangible by ordinary remedies.

1166. **Probate Courts.** — In most of the states there are special probate courts, — special courts, that is, charged with jurisdiction over the proof of wills, the administration of estates, the appointment of guardians, administrators, etc., the care of the estates of wards, and, in general of the proper disposition of the property of persons deceased. In some of the states, however, these functions are left to the ordinary courts of law.

1167. In England this probate jurisdiction was, from the first until a very recent date, a prerogative of the ecclesiastical courts, and in two of our states the probate courts retain the names of the officers who exercised this function in the place of the bishop: in Georgia the court is

called the court of the 'Ordinary,' in New York the 'Surrogate's' court. In New Jersey, with a reminiscence of the same origin, it is called the 'Prerogative' court. In several states, on the other hand, it is known, by virtue of one side of its function, as the 'Orphan's' court.

1168. **Judges.** — The judges of most of the state courts are elected, generally by the people, in a few cases by the legislature; but in several states they are nominated by the governor and appointed by and with the advice and consent of the Senate. In New Hampshire they are appointed by the governor by and with the advice and consent of the Council.

1169. Supreme court judges are usually elected by the people of the state at large; circuit, district, county, municipal, and other judges by the electors of the areas in which they serve.

1170. The terms of judges range all the way from two years to a tenure during good behavior. The constitutions of more than three-fourths of the states permit the removal of judges by the legislature, or by the governor at the request of the legislature. In Florida, Massachusetts, and Rhode Island all judges of the higher courts hold during good behavior; in New Hampshire until seventy years of age. The length of the term varies with the grade of the court, the tendency being to give longer terms to the judges of the higher courts.

1171. **The qualifications** required of judges by state law are not stringent. Only some eight or nine of the states require by law any identification of their judges with the legal profession; and only six require 'learning in the law'; though custom and public opinion invariably confine the choice of judges to professional lawyers. Generally a certain age is required of judges (varying, where there is such a requirement, from twenty-five to thirty-five years), besides, in most cases citizenship and residence in the state or circuit. As a rule single judges hold all the courts except the highest. Supreme courts have a more or less numerous 'bench.'

1172. **The ministerial officers of the state courts**, the sheriffs, are generally not appointed by the judges or responsible to them, but elected by the people and answerable to 'constituents,' just as the judges themselves are. Even the clerks of the courts are often elected.

1173. The position of sheriff thus differs very materially from the position of a United States marshal (sec. 1317), the sheriff's counterpart

in the federal judicial system. The marshal is appointed by the President of the United States, and is responsible to a central authority, is part of a centralized organization of justice. The sheriff, on the contrary, is the organ of an extremely decentralized, an almost disintegrated, organization of justice. The bailiffs, the sheriff's deputies, are usually the appointees of the sheriff.

1174. **The State Executives.** — The Executives of the states are the least distinct parts of state organization, the least susceptible of being adequately pictured in outline, or indeed in any broad and general way. Under our system of state law the executive officers of a state government are neither the servants of the legislature, as in Switzerland, nor the responsible guides of the legislature, as in England, nor the real controlling authority in the execution of the laws, as under our own federal system. The Executive of a state has an important representative place, as a type of the state's legal unity; it has a weighty function of superintendence, is the fountain of information, the centre and source of advice, the highest organ of administration to the general eye; but it cannot be said to have any place or function of guiding power. Executive power is diffused by our law throughout the local organs of government; only a certain formal superintendence remains with the authorities at the state capitals.

1175. Of course this does not apply to the governor's *veto* power, — that contains real energy, — but only to executive functions proper; these are localized, not centralized, after the extremest pattern.

1176. Not all of the states have the same central executive officers. All have governors; a majority of them have lieutenant-governors; all have secretaries of state; all have treasurers; almost all have attorneys-general; and a majority, superintendents of education. Many have also auditors: eleven have comptrollers, and fifteen boards of education; four (Massachusetts, New Hampshire, Maine, and North Carolina) associate councils with their governors.

1177. For the rest, there are a great many minor officers of various functions in the different states; superintendents of prisons, for instance, registrars of land offices, superintendents of labor, bureaux of agriculture, commissioners of mines, commissioners of immigration, etc. There is

no uniformity between the administrations of the states as regards these special offices; different states undertake different functions, new or old, and create new, or revive old, offices accordingly.

1178. **The governor's term of office** is in almost all of the states either two or four years, although Massachusetts and Rhode Island give their governors a term of but a single year, while New Jersey elects hers for three. The lieutenant-governor, where such an officer is elected, has the same term as the governor, and is generally required to have the same qualifications.

1179. These *qualifications* consist, almost always, of citizenship of from two to twenty years' standing, residence within the state of from one to ten years, and age of from twenty-five to thirty years. In Maine it is required that the governor shall be a *native-born* citizen.

1180. **The terms of the other principal state officers** are usually the same as the term of the governor, though it is not uncommon to give to treasurers, secretaries of state, attorneys-general, and auditors a longer tenure. The qualifications required of the different officers are of the most various nature.

1181. The constitutions of many of the states still exhibit the jealousy of long terms of office which was so characteristic of the extreme democratic feeling generated in the colonies by the constant friction between the representatives of the people and officials who owed their offices, not to election, but to royal appointment. Seven states limit official tenure to a maximum period of seven years; Texas makes two years the maximum; and Massachusetts, Virginia, and Maryland give express constitutional sanction to *rotation in office*.

1182. Many states effect such a limitation with reference to the tenure of the governor's office by provisions setting bounds to the reëligibility of the governor. Thus some exclude their governors from successive terms; others allow only a single term to any one man within a specific period of, say, eight years; while still others withhold reëligibility altogether.

1183. **Contrast between State and Federal Executives.** — The federal executive was, as we have seen (sec. 1071), constituted in quite close accordance with the models of previous state organization; but the imitation can scarcely be said to have gone further than the adoption of the suggestion that the United States should have a single governmental head, a president, because the states

had tried and approved a single presidency. For the rest, the president was given the character, as regards his relations with the other officials of the federal system, rather of an English sovereign than of a state governor. Certainly the contrast between the official place and power of the president and the place and power of the state governors of the present day is a very sharp and far-reaching contrast indeed. The president of the United States is the only executive officer of the federal government who is elected; all other federal officials are appointed by him, and are responsible to him. Even the chief of them bear to him, in theory at least, only the relation of advisers; though in fact, it must be acknowledged, they are in effect his colleagues. Of state officials associated with the governor it may, on the other hand, be said that both in law and in fact they are colleagues of the governor, in no sense his agents, or even his subordinates, except in formal rank and precedence. They, like himself, are elected by the people; he is in no way concerned in their choice. Nor do they serve him after election. They are not given him as advisers; they are, on the contrary, coördinated with him. North Carolina, indeed, calls her chief officers of state a 'cabinet'; but they are not dependent upon each other even in counsel, and they are quite as independent of the governor as Congress is of the president. The only means of removal to which the principal officers of the states are subject is, ordinarily, *impeachment*, to which the governor also is equally exposed. Both they and he may be charged with official crimes and misdemeanors by the house of representatives, and tried, convicted, and removed by the senate of the state. Their only other responsibility is to the courts of law, to which, like other citizens, they are answerable, after removal from office, for actual breaches of law. Governor, treasurer, secretary of state, attorney-general, — all state officers alike, serve, not other officers, but the people, who elected them; upon the people they are dependent, not upon each other; they constitute no hierarchy, but stand upon a perfect equality.

1184. In Delaware, Maryland, New Jersey, Pennsylvania, West Virginia, and Texas the secretaries of state are appointed by the governor, subject to confirmation by the senate; in several states the attorney-general also is appointed; nor is it uncommon for the state

superintendent of education to be an appointee of the governor; and these facts offer apparent contradiction to the statement that the several constituent parts of the state executives stand always apart in complete independence and coördination, — especially when it is added that in one or two states officers so important as the secretary of state and the attorney-general *hold during the pleasure of the governor.* Several of the states empower their governors to suspend or remove subordinate officers against whom charges are preferred, and to institute criminal proceedings against them in the courts. Maryland authorizes the summary removal of sundry minor officials by the governor, and Michigan and New York even the suspension of the secretary of state or the treasurer, in case of corruption or gross misconduct, until the legislature can act; and in Delaware the governor can remove any public officer "convicted of misbehaving while in office, or of any infamous crime." But these cases constitute in fact no real exceptions: for the duties of such officers, after their appointment, are prescribed by constitutional provision or by statute, not by the governor; and the governor may remove them, not at his whim, or for mere administrative reasons, but for just cause only, and as if he acted as an officer of justice. In brief, even when appointed by him, they do not depend upon him.

1185. **Real Character of a State 'Executive.'** — The governor therefore, is not the 'Executive'; he is but a single piece of the executive. There are other pieces coördinated with him over which he has no direct official control, and which are of less dignity than he only because they have no power to control legislation, as he may do by the exercise of his veto, and because his position is more representative, perhaps, of the state government as a whole, of the people of the state as a unit. Indeed it may be doubted whether the governor and other principal officers of a state government can even when taken together be correctly described as 'the executive,' since the actual execution of the great majority of the laws does not rest with them but with the local officers chosen by the towns and counties and bound to the central authorities of the state by no real bonds of responsibility whatever. Throughout all the states there is a significant distinction, a real separation, between 'state' and 'local' officials; local officials are not regarded, that is, as state officers, but as officers of their districts only, responsible to constituents, not to central authorities. Throughout the country the sheriffs and other county officers, the county treasurers, clerks, surveyors,

commissioners, etc., and the town and city officials also, as well as the judges of the courts and the solicitors or district attorneys who represent the public authority before the courts, are, almost without exception, chosen by the voters of limited areas, and are regarded, for the most part, as serving, not the state, but *their part of the state.* Minor 'state' officers there are, — minor officers, that is, who ministerially serve the central offices, — and these are often appointed by the governor; but it is exceptional for the governor to control the local authorities by whom the laws are in fact put into actual operation. The president of the United States is the veritable chief and master of the official forces of the federal government; he appoints and in most cases can remove all federal marshals, district attorneys, revenue officers, post-office officials. But the governor of a state occupies no such position; nor does any high 'state' official; the central offices of a state constitute a system of supervision and report often, but seldom a system of control.

1186. In Michigan, it is true, all officials not legislative or judicial may be removed by the governor for just legal cause; in New York, too, sheriffs, coroners, district attorneys, and county clerks are removable by the same authority, and in Wisconsin sheriffs, coroners, district attorneys, and registrars of deeds; but such provisions are exceptional, and are not accompanied by any real integration of local government by a system of continuous central control. Government remains disjointed, — still lies in separated parts. (Compare sec. 1184.)

1187. **Relations of the Local to the Central Organs of Government in the States.** — It is characteristic of our state organization, therefore, that the counties, townships, and cities into which the states are divided for purposes of local government do not serve as organs of the states exactly, but rather as independent organisms, constituted what they are by state law, indeed, but, after being set up, left to themselves almost as entirely as if they were self-constituted. They elect their own officers, and, except for the occasional mandates of the courts, go their own paces in enforcing the general laws of the state.

1188. We have not, therefore, local '*self-government*,' in the sense in which Professor Gneist has found that term to be properly used when employed in the light of its Teutonic history; we have, instead, separate local self-direction which is not the application of government, but the play of independent action. Our local areas are not *governed*, in brief; they act for themselves. Self-government implies, when used in its strict historical meaning, that the officers of local administration are officers of

the *state*, of the central authority, whatever may be the machinery of their appointment, and that their responsibility is central, instead of to their neighbors merely. The only sense in which the local units of our state organizations are *governed* at all is this, that they act under general laws which are made, not by themselves, but by the central legislatures of the states. These laws are not executed by the central executive authorities, or under their control, but only by local authorities acting in semi-independence. They are, so to say, left to run themselves.

1189. **The Governor.** — The usual duties of a state governor may be conveniently summed up under four general heads: (1) As towards the legislature, it is his duty to transmit to the houses at each regular session, and at such other times as may be required, full information concerning the state of the commonwealth, and to recommend to them such measures as seem to him necessary for the public good. It is also his duty in case of necessity for such a step, or upon the requisition of a sufficient number of legislators, to summon the houses to extra session. (2) He is commander-in-chief of the state militia, and as such is bound to see, not only that foreign invasion is repelled, but also that internal order is preserved. (3) He exercises the clemency of the state towards condemned persons, having the right to grant pardons to persons convicted of crime, to remit fines and penalties, under certain conditions, and to remove political disabilities incurred in consequence of conviction of crime; though he exercises these high prerogatives subject always to a definite responsibility to public opinion and to the laws.

1190. In some states, as notably in Pennsylvania, the power of granting pardons is given to the governor, however, only in form, the sanction of a Board of Pardons being made necessary, whose action is semi-judicial. In New Jersey there is a *judicial committee* on pardons; and in Connecticut the legislature alone can pardon: the governor can only reprieve until the end of the next session of the legislature.

1191. (4) In all the states except three (Rhode Island, Ohio, North Carolina) the governor's assent is made necessary to the validity of all laws not passed over his dissent by a special legislative vote upon a second consideration made in full view of his reasons for withholding his signature. And in Rhode Island, Ohio, and North Carolina, though the governor has no

veto properly so-called, he can compel the reconsideration of any measure by the legislature.

1192. All bills which the governor signs, or upon which he does not take any action within a certain length of time, become law; those which he will not sign he must return to the legislature with a statement of his objections. Generally he must return bills which he thus rejects to the house in which they originated, though in Kansas he must return them always to the house of representatives.

1193. The vote by which a bill may be passed over the governor's veto varies very widely among the states. In Connecticut a mere majority suffices for its second passage; in other states a three-fifths vote is required, in some a two-thirds vote; sometimes a majority of elected members (instead of a special number within a mere *quorum*) must concur in a second passage; and sometimes two-thirds of the elected members. In Missouri it is provided that the votes of two-thirds of the elected members shall be necessary in the house in which the measure originated, while a mere majority of the other house will suffice.

1194. In fourteen of the states the governor is given the power to veto particular items in appropriation bills; as regards all other bills his approval or disapproval must cover all of the measure or none of it.

1195. **The Secretary of State.** — The title 'Secretary of State,' borne by a conspicuous officer in each of the states, is very apt to mislead those who have studied first the English executive or the functions of our own federal minister of foreign affairs. The federal Secretary of State is first of all an executive minister, only secondarily a secretary; and the five principal Secretaries of State in England are equally without prominent secretarial functions. They are one and all executive heads of department.

1196. The federal Secretary of State is entitled to his official name chiefly by virtue of certain minor duties seldom thought of by the public in connection with the Department of State. He has charge, for example, of the seal of the United States; he preserves the originals of all laws and of all orders, resolutions, or votes of the houses which have received the force of law; he furnishes to Congress, besides consular and diplomatic reports, lists of passengers arrived in the United States from foreign countries, etc.

1197. The chief clerical features of the office which the five Principal Secretaries of State in England theoretically share (sec. 875) would seem to be represented by the necessity of the countersignature of some one of them to the validity of the sign-manual.

1198. The Secretaries of State in the commonwealths of our Union, on the contrary, can show substantial cause for holding their title; the making and keeping of records is the central duty of their office. It is usually their duty to register the official acts of the governor, to enroll and publish the Acts of the Legislature, to draw up all commissions issued to public officers, to keep all official bonds, to record all state titles to property, to keep and affix, where authorized, the seal of the commonwealth, to preserve accurate maps and careful records of the boundaries of the various civil districts of the state, (the counties, townships, etc.) and to give to all who legally apply duly attested copies of the public documents in their keeping. In brief, the Secretary's office is the public record office.

1199. Often other duties are assigned to the Secretary of State. In one state, for instance, he is constituted Internal Improvement Commissioner; in another Surveyor-general. But such additional functions are not necessarily characteristic of his office.

1200. It is to the Secretary of State in each commonwealth that the votes of the state's electors for President and Vice-President are returned; and it is he who transmits them to the president of the Senate to be opened in the joint session of the two houses.

1201. Votes in state elections also are generally returnable to the Secretary of State's office, and the Secretary of State is very commonly one of the state canvassers of election returns. Such duties manifestly flow very naturally from the general duties of his office.

1202. **The Comptroller,** or that equivalent officer, the state *Auditor*, is public accountant. It is his function to examine and pass upon all claims presented against the state under existing provisions of law; to audit the accounts of all officers charged with the collection of the revenue of the state, filing their vouchers, requiring of them the necessary bonds, and crediting them with all sums for which they present the state Treasurer's receipt; to ensure uniformity in the assessment and collection of the public revenue by preparing and furnishing to the local fiscal officers the proper forms and instructions; to issue warrants for all legal disbursements of money from the treasury of the state, keeping a careful account with the state treasurer; to submit his books and accounts at any time to

examination by the legislature, — in a word, to regulate the assessment, collection, and disbursement of the public moneys.

1203. **The State Treasurer** may be said simply to keep the public moneys subject to the warrants of the Comptroller. Without such warrant he can pay out nothing.

1204. These, manifestly, are not offices of control. The Comptroller, for example, can generally proceed against local fiscal officers through the local law-representatives of the state, the local states-attorneys, in the ordinary courts, for the purpose of securing the necessary bonds when these are not promptly or properly given, or of enforcing the payment of moneys withheld or uncollected; and he may make test of the validity or sufficiency of official bonds by any means within his reach; but he has none but this indirect control, exercised through the courts over officers who refuse bond or who neglect the forms and instructions issued to them regarding the assessment and collection of taxes. The whole machinery of control is local, not central, — through courts and states-attorneys who are themselves elected by the same persons, in town or county, by whom the collecting officers themselves are chosen. The local fiscal officers are not officers of the state treasury, but officers of the towns and counties whom the state employs as its agents.

1205. **The State Superintendent of Education** often occupies a somewhat different position. It is frequently his prerogative to prescribe the qualifications of teachers and the methods by which they are to be selected; he is required to make a thorough inspection of the schools throughout the state; often he is given power to secure proper reports of school work through special inspectors appointed to act instead of local superintendents whose reports are irregular or unsatisfactory. School administration is recognized to require a certain degree of centralization of administrative authority, and so to constitute a legitimate exception to the general rules as to the constitution of executive power in the states. Still, even the power of a state Superintendent of Education does not often go very much beyond supervision. The powers of district or township school directors remain in most cases very absolute as regards the management of the schools. They are governed by statute, not by the state Superintendent.

1206. **Constitutional Diffusion of the Executive Power.** — The constitutions of at least seven of the states make very frank confession of

the diffusion of executive authority upon which I have dwelt as characteristic of our state system. Thus the constitution of Alabama provides that the executive power "shall consist of the governor, secretary of state, state treasurer, state auditor, attorney-general, and superintendent of education, *and the sheriff for each county*." The constitutions of Arkansas, Colorado, Illinois, Minnesota, Pennsylvania, and Texas make similar enumerations, with the exception of the sheriffs of the counties. The Florida constitution of 1868 provided that the governor should be "assisted by a cabinet of administrative officers" appointed by himself, subject to the confirmation of the senate; but clothed these officers with functions which made them in fact not assistants but colleagues.

1207. The constitutions of most of the other states declare the executive power to be vested in the governor, but are hardly through with outlining his functions before they provide for the erection of executive departments among which the greater part of executive power shall be parcelled out; so that the arrangement is everywhere practically that of those states which in effect declare the executive office to be 'in commission' by enumerating the officers who are to divide its duties.

1208. **Full Legal, but no Hierarchical, Control.** — This, then, is the sum of the whole matter: the control of law, exercised through the courts, is thorough and complete: statutes leave to no officer, either central or local, any considerable play of discretionary power: so far as possible they command every officer in every act of his administration. But no hierarchy stands between an officer and the law. The several functions of executive power are segregated, — each official, so to say, serves his own statute. So thorough is the control attempted by legislation, — and so potent among us is the legal habit and conscience, the law-abiding sense, — that no official control, no hierarchical organization has been deemed necessary.

Local Government.

1209. **General Characteristics.** — The large freedom of action and broad scope of function given to local authorities is the distinguishing characteristic of the American system of government. Law is central, in the sense of being uniform and the command of the central legislature in each state; and its prescriptions are minute; but function and executive power are local. There is a single comprehensive statutory plan, but a host of unassociated deputies to carry it into effect, an infinite variety in the local application of its principles. General laws are given to the localities by state legislation, and these laws are generally characterized by a very great degree of particularity and detail of

provision; but no central authority has executive charge of their application: each locality must see to it for itself that they are carried out.

1210. **Duties of Local Government.** — The duties of local government include Police, Sanitation, the Care of the Poor, the Support and Administration of Schools, the Construction and Maintenance of Roads and Bridges, the Licensing of Trades, the Assessment and Collection of Taxes, besides the Administration of Justice in the lower grades, the maintenance of Court Houses and Jails, and every other affair that makes for the peace, convenience, comfort, and local good government of the various and differing communities of each commonwealth. In many places libraries are included among the institutions given into the charge of the officers of local government. Local officers look to state laws for their authority; but practically state administration represents only the unifying scheme of local government. Local administration is *the* administration of the state.

1211. **Local Varieties of Organization.** — Almost without exception the states which have been added to the original thirteen by whom the Union was formed have derived their local institutions, whether by inheritance or by imitation, from the mother states of the Atlantic seaboard. Wherever New England settlers have predominated the *township* has taken quick rootage and had a strong growth; wherever Southern men have gone the *county* has found favor above other forms of local organization; wherever the people from the two sections have met and mixed, as in the early days they met and mixed in New York, New Jersey, and Pennsylvania, the same combination or mixture of institutions that is characteristic of the middle Atlantic states is found in full prominence. But in all cases the new foundations in the West have this common feature: they have all been in a greater or less degree artificially contrived. Towns have not grown up in the Northwest for the same reasons that led to their growth in New England, in the days when isolation was necessary and when isolation involved compact and complete self-government (secs. 1035–1037): they have, on the contrary, been deliberately constructed in imitation of New England models. Neither have

Western counties been developed by processes of pioneer agricultural expansion like those which made the irregular, and in a sense geographically natural, counties of Virginia (secs. 1042–1044): they have, on the contrary, been geometrically laid off in the exact squares of the government survey and deliberately organized after the Southern fashion because the settlers wanted to reproduce by statute the institutions which in their old homes had been evolved by slow, unpremeditated growth. The institutions of the admitted states, in a word, were transplanted by enactment, whereas the institutions of the original states were sown by habit. It by no means follows that these newer institutions lack naturalness or vigor: in most cases they lack neither, — a self-reliant race has simply readapted institutions common to its political habit; but they do lack the individuality and the native flavor often to be found in the institutions in whose likeness they were made.

1212. The differences of institution, then, which show themselves in the East between local government in New England, local government in the South, and local government in the central belt of Atlantic states extend also into the West. There, too, we find the three types, the township type, the county type, and the compound type which stands between the two; but the compound type is in the West naturally the most common. The Westerner has had the sagacity to try to combine the advantages of all the experiments tried in the older states, rejoicing in being fettered by no hindering traditions, and profiting by being restrained by no embarrassing incapacity for politics.

1213. Keeping these facts in mind, it will be possible to consider without confusion, the Township, the County, the School District, the Town, and the City as elements of local government in the United States. The different place and importance given to each of these organs in different sections may be noted as we proceed.

1214. **The Township: its Historical Origin.** — The township is entitled to be first considered in every description of local government in the United States not only because it is a primary unit of administration, but also by reason of its importance and because of its ancient and distinguished lineage. It is a direct

lineal descendant from the primitive communal institutions which Cæsar and Tacitus found existing in the vigor of youth among the peoples living in the ancient seats of our race. The New England town was not an American invention; and the settlers upon the northern coasts did not adopt the town system simply because they were obliged to establish themselves in isolated settlements in a harsh climate and among hostile native tribes. We have seen (secs. 1035, 1036) that they kept together in close settlements for religious purposes, for mutual defence, and for purposes of trade, and that their settlements were often completely isolated by stretches of wild primeval forest; but their form of government, or at least the talent and disposition for it, they brought with them, an inheritance of untold antiquity. Their political organization was like a spontaneous reproduction of the ancient Germanic Mark (secs. 287, 833). In most cases they regarded the land upon which they settled as the property of the community, just as their remote barbarian ancestors had done; like those ancestors, they divided the land among families and individuals or worked it in common as might be decided by public vote in general assembly, in open 'folk-moot' we may call it. This same 'town-meeting,' as they styled it, voted the common discipline, elected the officers, and made the rules of common government. Each group of colonists constituted themselves a state with a governing primary assembly. They reëstablished, too, the old principles of folk-land. Whether they tilled their lands in common or divided them in severalty, they had always a communal domain, part of which was kept as open common for the general pasturage, and the rest of which was given over in parcels, from time to time, for settlement. They were inventing nothing; they were simply letting their race habits and instincts have natural play. Their methods showed signs at almost every point of having been filtered through intervening English practices; but they rested, none the less, upon original Teutonic principles.

1215. The exceptions to the principle of folk-land occurred where, as in the Hartford, Windsor, and Wethersfield settlements on the Connecticut, the land was held, not in common by the civil community, but in common by a sort of corporation of joint owners under whose supervision

the new colonies were established. These joint owners were quite distinct from the communal authorities.[1]

1216. **Absorption of the Town in Larger Units of Government.** — It was towns of this primitive pattern that were drawn together ultimately into the New England colonies of the later time, by the processes I have already described (sec. 1038); and in becoming parts of larger organizations they lost to some extent their independence of movement, as well as in some slight degree their individuality also. In some cases, as for instance in the coalescence of 'Connecticut' and New Haven (sec. 1051), the establishment of central state legislative control over the towns took the shape of a mere confirmation to them of their old functions and privileges, and in this way fully recognized their elder and once sovereign place in the historical development of the commonwealth; but it in all cases necessarily resulted in their virtual subordination. It led also to the creation of new areas of local government. Towns were grouped, at first for judicial purposes only, into counties, and the counties came in time to furnish a very convenient basis for certain administrative functions once vested exclusively in the smaller areas. Great cities, too, presently grew up to demand more complex, less simply and directly democratic, methods than those of the towns. But no change has seriously threatened town organization with destruction. The 'town' is still the most characteristic and most vital element of local government in New England; and it still has substantially the same officers, substantially the same functions, that it possessed at its foundation in America.

1217. An influx of foreigners has in many places disturbed and impaired the town system, and the cities, which draw to themselves so rapidly the rural population, but which are too big for the primitive methods of town government, are powerful disintegrating elements in the midst of the old organization; but the new adaptation and development of the township in the West, and the tendency to introduce it in some parts of the South, seem still to promise it honor and length of days.

[1] See Andrews, *The River Towns of Connecticut* (Johns Hopkins Studies, 7th Series).

1218. **Town-meeting.** — The sovereign authority, the motive power, of town government is the Town-meeting, the general assembly of all the qualified voters of the town, which has reminded so many admiring observers of the ancient Grecian and Roman popular assemblies and of the *Landsgemeinde* of Switzerland. The regular session of this assembly is held once a year, usually in the spring,[1] but extra sessions are held from time to time throughout the year as occasion arises, due notice being given both of the time of meeting and of the exact business to be considered. Town-meeting elects all officers, — its regular annual session being the session for elections, — and decides every affair of local interest.[2] It is presided over by a 'Moderator' and attended by the town officers, who must give a full account of their administration, and who must set before the Meeting a detailed statement of the sums of money needed for local government. These sums, if approved, are voted by the Meeting and their collection ordered, on a prescribed basis of assessment. Everything that the officials and committees of the town have done is subject to be criticised, everything that they are to do is subject to be regulated by the Meeting.

1219. **The Town Officers.** — The officers of the town are certain 'Selectmen,' from three to nine in number, according to the size and needs of the town, who constitute the general executive authority for all matters not otherwise assigned; a Town Clerk, who is the keeper of the town records and registers; a Treasurer; Assessors, whose duty it is to make valuation of all property for tax assessment; a Collector of the taxes voted by the Meeting or required by the county and state authorities; a School Committee; and a variety of lesser officers of minor function, such as Constables, together with certain committees, such as library trustees, etc. Generally there are also overseers of the poor and surveyors of highways.

1220. To this corps of officers all the functions of local government belong. The county authorities cannot enter their

[1] In Connecticut in the autumn.

[2] In some of the coast towns (townships), as notably in Connecticut, the regulation of the use of the oyster beds is a very prominent question in town-meeting.

domain, but must confine themselves to the judicial duties proper to them and to such administrative matters as the laying out of inter-town roads, the issuing of certain county licenses, the maintenance of county buildings, etc., for the due oversight of which larger areas than the town seem necessary. County expenses are defrayed by taxes raised by the towns: the county authorities apportion such taxes, but do not lay them.

1221. In Rhode Island the only county officials are those connected with the administration of justice.

1222. **The Township of the Northwest.** — The town may, therefore, be said to exist in New England in its full historical character and simplicity, though much overshadowed by great cities, and everywhere modified and partially subordinated by the later developments of state and county. In the *Northwest*, whither New England emigrants have gone, it has entered another phase and taken on another character, — a character which may perhaps foreshadow its ultimate organization, should the country have at any future time the uniform practices of local government now dimly promised by certain incipient forces of institutional interchange and imitation.

1223. In the first place, the Northwestern township is more thoroughly integrated with the county than is the New England township. County and township fit together as pieces of the same organism. In New England the township is older than the county, and the county is a grouping of townships for certain purposes; in the Northwest, on the contrary, the county has in all cases preceded the township, and townships are divisions of the county.

1224. The county preceded the township because the county furnishes, for our people, the natural basis of organization for a scattered agricultural population; the township came afterwards, in obedience to the habit of the New England settlers, as the natural organization for a population which had become more numerous and which had drawn together into closer association.

1225. **Its Origin.** — It was *school organization* that supplied the beginnings of the township system in all the more newly settled portions of the country. The Western township has sprung out

of the school as the New England township of the earliest days sprang out of the church. The government surveyor, who has everywhere preceded final settlement in the West, has in all cases mapped out the land in regular plots of thirty-six square miles each, which, for convenience, he called 'townships'; and in every township Congress has reserved at least a square mile of land (one 'section') for the endowment of schools. This endowment had to be administered by the settlers; school organization had to be effected; the name *township* had already been given to the district so endowed; and there was, therefore, naturally school organization on the basis of the township. From this there eventually issued an equally natural growth of local political institutions.[1]

1226. **Spread of Township Organization.** — In the newer portions of the country the development of the township has progressed almost in direct ratio with the development of local government: in many sections, even where population is comparatively dense, county organization has been made to suffice for such districts as have not assumed the structure and privileges of village or city incorporation; but wherever any special effort has been made to perfect local rural organization for administrative purposes, the township has been accepted as the best model of political association.

1227. It has received its widest acceptance in such middle states as New York and Pennsylvania, and in the great Northwestern states of Michigan, Wisconsin, Illinois, and Minnesota. Elsewhere, in the middle West, in Ohio, Indiana, and Kansas, for example, and in such states of the far West as California, it is less fully developed, and occupies a much more subordinate place as compared with the county. The county, indeed, may be said to be the prevalent unit of local government in California, as well as in Colorado, Oregon, Nebraska, and Nevada.

1228. **Township Organization.** — The *organization* of the township outside of New England varies with its development. Where it is most vigorous there is the town-meeting, exercising powers strictly defined and circumscribed by statute and somewhat less extensive than the powers of the town-meeting in

[1] See p. 10 of *Local Government in Illinois*, by Dr. Albert Shaw (Johns Hopkins Studies in Historical and Political Science, First Series).

New England, but still covering a multitude of local interests and representing a very real control. Where it is less developed there is no town-meeting, but instead only the processes of popular election to local office. In all cases the 'selectmen' have disappeared: at least we find no officers bearing their name, and no officers possessing exactly their functions. Where the township is most completely organized we find one or more 'supervisors' standing at the front of township administration, who are clothed with the duties of overseers of the poor, exercise oftentimes a certain control over the finances of the township, and are in general function the presiding and directing authorities of the administration.

1229. In Michigan and Illinois a single supervisor presides over each township; and in Michigan each supervisor is also tax assessor, while in Illinois he is treasurer. In Wisconsin and Minnesota there are three supervisors in each township; in Ohio three nearly equivalent officers called 'trustees.' In Illinois the school township, though generally coincident in area with the civil township, is not identical in organization. The officer called township treasurer is treasurer of the school fund.

1230. Where there are several supervisors or trustees in the township, it is common to associate them together as a Board, and under such an arrangement they very closely resemble the New England board of selectmen in their administrative functions. Township boards also exist under the laws of some states in which there is but a single supervisor for each township, being composed, usually, besides the supervisor, of such officers as the town clerk and the Justices of the Peace. In Michigan such a board has rather extensive supervisory powers; in Illinois it is a committee of audit simply.

1231. The number of township officers varies with the degree of development to which the township system has attained. In Ohio, where the system is still more or less in germ, there are, besides the three trustees, no township officers save a clerk and a treasurer. In Michigan, even, where the township system is fully accepted, there is neither an assessor nor a collector of taxes, the supervisor acting as assessor and the treasurer as collector. In Illinois, on the other hand, there is always a full corps of officers:

supervisor, collector, assessor, clerk, commissioners of highways, justices of the peace, constables, etc., — and for the school township a body of school trustees.

1232. The term of all officers except justices of the peace, road and school commissioners, and constables is generally but a single year, as in New England; the terms of the other officers named are often three or four years.

1233. Where there is a town-meeting the officers are elected by it; where there is no town-meeting they are chosen at the polls.

1234. **The Township in the Middle Atlantic States.** — It is reversing the historical order to speak of the townships of the middle Atlantic states after discussing the townships of the newer West; but it is not reversing the order of convenient exposition. The processes of formation are plainly visible in the West; in the East they are more complex and obscure, being the formations of history rather than of legislation.

1235. **The New York township** is like the townships of Michigan and Illinois in its structure and functions; but like because it is an original, not because it is a copy. Over it presides a single supervisor who is the treasurer and general financial officer of the area. It has its clerk, its assessor, its collector, its commissioners of highways, its constables, its justices of the peace. It has also special overseers of the poor. An annual town-meeting, under the presidency of the justices of the peace, or of the town clerk, elects all officers, passes sundry by-laws, votes taxes for schools and poor relief, and constitutes the general governing authority.

In counties containing 300,000 or more inhabitants there is a provision for the election of township officers at the polls.

1236. **The Pennsylvania Township.** — The New York township system suggested the system of the states about the lakes, and stands nearest in the order of development to the township of New England. The township of Pennsylvania, on the other hand, suggests the township system of the next lower belt of middle Western states. In it there is no town-meeting, but only an executive machinery. A board of two or three supervisors, holding for a term of three years, presides over the township, and

has as its most prominent function the care of highways. For the rest, there are the usual officers, with the somewhat uncommon addition of three auditors. Where the township is charged with the care of the poor, two special overseers are elected.

1237. **Origins of Local Government in the Middle States.** — Local government in New York, Pennsylvania, Delaware, and most of New Jersey runs back, as to a common source, to the system established in colonial times by the Duke of York as proprietor. Under that system the township was the principal organ of local government. Its officers were certain constables and overseers; and above the township was only an artificial 'Riding,' presided over by a sheriff. Certain General Courts levied highway and poor rates, appointed overseers of highways, etc. After the period of the Duke's proprietorship, the development of local government in the several parts of his domain exhibited a considerable variety. The township retained its importance in New York, but further south, particularly in Pennsylvania, the county gained the superior place.

1238. **The Township in the South.** — Wherever, in the South, the principle of local taxation for local schools has been fully recognized, there the township has begun to show itself, at least in bud. Virginia, the oldest of the southern states, and in most respects the type of all the rest in institutional development, for six years (1868–1874) tried the township system in its full form. But the experiment proved unsatisfactory. The system, instead of being gradually introduced and allowed to take a normal way of growth, was adopted whole, proved too artificial, and was very soon abolished by constitutional amendment. North Carolina and West Virginia have adopted a township system of a very much more rudimentary sort, and with better results.

1239. **The County.** — The division of power between township and county can be most intelligibly discussed in connection with the following outline of county organization. The natural history of the county is best studied in the South, where, despite the partial adoption of township organization here and there, the county remains the chief and almost the only organ of local order and government. We have seen (secs. 1042–1044) how natural a basis of government it was for a widespread agricultural population. The county was imported into the West by Southern settlers, and also found there at first its natural reason for existence in a similarly diffused population. New England immigration and new

conditions of industrial and social combination have created the township within the county in the West, as similarly altered conditions have begun to create it in the South also.

1240. In all cases, it would seem, the county was originated primarily for judicial purposes, as an area in and for which courts were to be held, though in such confederate colonies as Connecticut it was also in part the outgrowth of the union of different groups of once independent towns. In the South the county became also the single area for the administrative organization of local government, being given the functions elsewhere divided between the county and smaller areas like the township. In New England certain general functions of a limited character have been conferred upon it by subtraction from the townships. In the Northwest, county and township have been created almost simultaneously and side by side, and are carefully integrated.

1241. The American county was of course in the first instance a frontier copy of the English shire; but its growth affords no analogy to the growth of its English prototype. The English shire in a great many instances traces its history back to the time when it was a separate Saxon kingdom, and may be said to have as natural boundaries as France; American counties, on the other hand, have all been deliberately 'laid out,' as judicial and administrative subdivisions, and have no such independent historical standing.

1242. **The Southern county**, which undertakes all of local administration, has a complete set of officers. At its head is a small board of *county commissioners*. Acting under the general superintendence of the commissioners, there are generally a county treasurer, auditor, superintendent of roads, superintendent of education, and superintendent of the poor. On its judicial side, the county has its sheriff, its clerk, its ordinary or surrogate, its coroner, and its state-attorney, the latter generally acting for a judicial district inclusive of several counties. The functions of the county embrace the oversight of education, the maintenance of jails and poorhouses, the construction and repair of highways, and all local matters. County officers are in almost all instances elected by popular vote. Under the Southern county system the sheriff is commonly also tax-collector.

1243. **Where the township exists** there is great variety of county organization, almost the only point of common likeness being the organization of justice. The county always has its sheriff, and generally its separate courts, with the usual coroner and clerk. The variety shows itself in the field of administrative structure. Sometimes, as in New York, Michigan, and Illinois, the county administrative authority is a board composed of the supervisors of all the townships; sometimes, as in Pennsylvania and Minnesota, the county authority is a board of three commissioners. In Wisconsin the county board consists of members each of whom is chosen by two or more townships. Where the county is given least power, as in New England, its administrative functions hardly extend beyond the maintenance of county buildings such as the jail and courthouse, the granting of certain licenses, and the partial supervision of the highway system. In New York and the Northwest the county authorities often undertake the relief of the poor, sometimes exercise an extensive control over the debt-contracting privileges of the smaller areas, often audit the accounts of local officers, and supervise taxation for purposes of equalization.

1244. Where townships exist, then, the division of functions may be said to be as follows: the township is the area for the administration of schools, for the relief of the poor (unless by special popular vote this function be given to the county), police, the construction and maintenance of highways, and sanitation; while the county is the area for the administration of justice, for the maintenance of jails, courthouses, and sometimes poorhouses, for tax equalization, and often for the exercise of certain other general supervisory powers.

1245. **Villages, Boroughs, Cities.** — Counties and townships are areas of rural organization only. With the compacting of population in great towns and cities other and more elaborate means of organization became necessary, and a great body of constitutional and statutory law has grown up in the states concerning the incorporation of urban areas. There is no complete and general municipal corporations act in any of our states such as that under which, in England, cities of all sizes may acquire the privileges and adopt the organization of full borough government (sec 989): the largest towns are left to depend for their incor-

poration upon special acts of legislation. The large cities of the country consequently exhibit a great variety of political structure, and even cities in the same state often differ widely in many material points of organization and function.

1246. The electors or freeholders of less populous urban districts are in most of the states empowered to obtain a simple sort of urban organization and considerable urban powers, by certain uniform routine processes, from the courts of law; *villages* (as they are called in New York), *boroughs* (as they are styled in Pennsylvania), *towns* (as they are sometimes designated in the South),[1] *cities of the lesser grades* (in states where towns are classified according to population), may usually get from the courts as of course, upon proof of the necessary population and of the consent of the freeholders or electors, the privilege of erecting themselves into municipal corporations under general acts passed for the purpose; very much as private joint-stock companies may get leave to incorporate upon showing to the court evidence of the possession of the necessary membership, stock, or paid-up capital.

1247. The town or borough is, however, a public, not a private, corporation, receiving by delegation certain powers of government; and many states have left with their legislatures the power to create all public corporations by special act. The incorporation of towns is not, therefore, universally governed by general statute.

1248. **The Authorities of urban districts** thus erected into separate corporations succeed, generally, to all the powers of township officers within their area and constitute a local body apart; but usually the area thus incorporated does not cease to be a part of the county in which it lies. It continues to pay county taxes and its electors continue to take their part in the choice of county officials. In some cases, however, cities have been definitely separated from the counties in which they lie. This has been the virtually uniform policy of Virginia. In other cases cities have by growth absorbed the counties in which they were situated, as has happened, for example, by the expansion of New York, Philadelphia, New Orleans, and San Francisco. Baltimore and St. Louis have been made independent of county gov-

[1] The name *town* when used in New England always means, not an urban district, but a town*ship*.

ernment and county obligations by special legal arrangement. The organization of incorporated towns is unlike that of either county or township principally in this, that they have at the front of their government a representative council which within its sphere is a law-making authority.

1249. **A common model of organization** for the smaller urban areas is: a mayor, president, or chief burgess; a small town council given extensive power of making by-laws, considerable power of taxation for local improvements as well as for local administration, and other powers of local direction which quite sharply differentiate it from the merely executive boards often found in the townships and always found in the counties; a treasurer; a clerk; a collector; a street commissioner; sometimes overseers of the poor; and generally such other minor officers as the council sees fit to appoint.

1250. **Organization of Government in Cities.** — The difference between the organization of these smaller urban areas and the organization of great cities is a difference of complexity not only but often also a difference of kind. Cities, we have seen (sec. 1162), are often given a separate judicial organization, being made in effect separate judicial circuits or counties, with their own courts, sheriffs, coroners, and state-attorneys; and are sometimes also made quite independent of the counties in which they lie (sec. 1248). They are given also larger councils, with larger powers; a larger corps of officers; and greater energy of self-direction than other local areas possess.

1251. **The Council** of a great city usually consists of two sections or 'houses,' — a board of *aldermen* and a board of *common councilmen*, differing very much as the two houses of a state legislature differ, in the number and size of the districts which their members represent. In most of the cities of New York state, however, there is but a single legislative chamber, called sometimes the Board of Aldermen, sometimes the Common Council.

1252. These boards always constitute the law-making (or rather *ordinance*-making) and taxing power of the city; and always until recent years they have been constituted overseers of administration also, by being given the power to control it not only by withholding moneys, but also through direct participation in the power of appointment to the minor city offices, — all those, that is to say, not filled by popular election. The chief officers of every city have usually been elected, but all others have, as a rule, been appointed by the mayor subject to confirmation by the

city council. The tendency of all very recent legislation with reference to the constitution of city governments has been to concentrate executive power, and consequently executive responsibility, in the hands of the mayor, leaving to the council only its ordinance-making power and its function of financial control. Some of the most recent charters have even extended the appointing power of the mayor so as to include the most important executive offices of the city administration. In her latest constitution (1894) New York has tried the experiment of giving the mayors of her cities a suspensive veto on state legislation touching municipal matters. Local bills are submitted to the mayors of the cities which they affect for their approval. But, if they do not approve, the repassage of the act by a mere majority in the legislature suffices to make it law, notwithstanding.

1253. **School Administration.** — Wherever the public school exists there we find the School District the usual administrative area for educational purposes. Where the county system prevails the county is divided into school districts; where the township system prevails the township is divided into school districts. In every case there are district directors or trustees who control school administration, and usually control it so entirely as to prevent in great part the existence of any uniform system of education for the whole state; but where the township system prevails there is generally more participation on the part of the people, gathered in district-meeting, in school administration, and generally a fuller power of local taxation.

1254. In New England recent years have been witnessing the disappearance of the separate school district in some states, and its absorption by the township. Thus in Maine, in New Hampshire, and in Connecticut school administration is being transferred from district to township officers, and the township is being made the school area. In Massachusetts the school district system was entirely abolished in 1882, and township school administration substituted. And outside New England the same substitution has here and there been made, — as, for example, in Pennsylvania.

1255. **In the Northwest** schools usually receive support from three distinct sources: from the land granted to each township by the federal government; from a general state tax for education, whose proceeds are distributed among the townships, to be further distributed by the township authorities

among the districts; and from district taxes levied by the district directors. In New England there is generally state and township taxation for the support of the schools. In the South, under the county system, there is state taxation only, for the most part, save in certain exceptional localities, and in the greater towns. In many cases in the Northwest the school district is coincident in area with the civil township, though distinct and separate in organization.

1256. Nowhere is there sufficient centralization of control. State superintendents or other central educational authorities are without real administrative powers (compare sec. 1205); county superintendents seldom have much authority; township trustees or committees, as a rule, have little more than a general supervision and power of advice; usually the directors of the smallest area have the greater part of the total of administrative authority, applying their *quota* of even the state taxes according to their own discretion. The result is, variety in the qualifications of teachers, variety in the method of their choice, variety in courses of study, variety in general efficiency.

1257. **Taxation.** — The most striking feature regarding local taxation in the United States is, the strict limitations put upon it by constitution or statute. Commonly no local authorities can tax beyond a certain fixed percentage of the appraised value of the property of their district. Under the county system, requisition is made upon the officers of the counties for the taxes voted by the legislature for state purposes, and the county boards raise them, together with the county taxes, upon the basis of the county assessment. Where the township exists, the process goes one step further: requisition is made upon the townships for both the state and county taxes, and the townships raise these, together with their own taxes, upon the basis of the assessment made by their own assessors.

1258. An effort is made in most of the states, however, to equalize assessments. Some county authority acts as *a board of equalization* with reference to the assessments returned by the assessors of the several townships, and above the equalization boards of the counties there is generally a state board of

equalization, whose duty it is to harmonize and equalize, upon appeal, taxation in the several counties. Appeals always lie from the local assessors to these boards of equalization. The system is, however, only partially successful. It has proved practically impossible, under the present system of localized authority, to avoid great varieties and inequalities of assessment: local officials try to cut down the shares of their districts in the general taxes as much as possible.

1259. **General Remarks on Local Government.**— Several features observable in our systems of local government taken as a whole are worthy of remark. (1) In the first place, outside of the towns and cities, the separately incorporated urban districts, there is a marked absence of representative, law-making bodies. Almost everywhere local officers and boards have merely executive powers and move within narrow limits set by elaborate statute law.

(2) In the second place, where there are local law-making bodies, they act under strict constitutional law: under charters, that is, possessing thus a strong resemblance, of *kind*, to state legislatures themselves.

(3) In the third place, central control of local authorities exists only in the enforcement, in the regular law courts, of charters and general laws: there is nowhere any central Local Government Board with discretionary powers of restriction or permission. (Compare sec. 1009.)

(4) In the fourth place, relatively to the central organs of the state, local government is, administratively, the most vital part of our system: as compared either with the federal government or with local authorities, the central governments of the states lack vitality not only, but do not seem to be holding their own in point of importance. They count for much in legislation, but, so far, for very little in administration.

The Federal Government.

1260. **The Constitution of the United States** does not contain all the rules upon which the organization of the federal government rests. It says that there shall be a Congress which shall exercise the law-making power granted to the general government; a President who shall be charged with the execution of the laws passed by Congress; and a Supreme Court which shall be the highest court of the land for the determination of what is lawful to be done, either by individuals, by the state governments, or by the federal authorities, under the Constitution and laws.

It prescribes also in part the organization of Congress. But it does not command how Congress shall do its work of legislation, how the President shall be enabled to perform his great function, or by what machinery of officers and subordinate courts the Supreme Court shall be assisted in the exercise of its powers. It leaves all detail of operation to be arranged by statute: and statute accordingly plays an all-important part in the organization of the government.

1261. The Constitution furnishes only the great foundations of the system. Those foundations rest upon the same firm ground of popular assent that supports the several constitutions of the states. Framed by a federal convention and adopted by representative conventions in the states, it stands altogether apart from ordinary law both in character and sanction.

1262. **Amendment of the Constitution.** — The Constitution cannot be amended without the consent of two-thirds of Congress and three-fourths of the states. Amendments may be *proposed* in one of two ways: either (*a*) two-thirds of the members of each house of Congress may agree that certain amendments are necessary; or (*b*) the legislatures of two-thirds of the states may petition Congress to have a general convention called for the consideration of amendments, and such a convention, being called, may propose changes. In both cases the mode of *adoption* is the same. Every change proposed must be submitted to the states, to be voted upon either by their legislatures or by state conventions called for the purpose, as Congress may determine. Any amendment which is agreed to by three-fourths of the states becomes a part of the Constitution.

1263. The fifteen amendments so far made to the Constitution were all proposed by Congress. No general constitutional convention has been called since the adjournment of the great body by which the Constitution was framed in 1787.

1264. None of the written constitutions of Europe are so difficult of alteration as our own. In Germany, as we have seen (sec. 499), a provision changing the imperial constitution passes just as an ordinary law would pass, the only limitation upon its passage being that fourteen negative votes in the *Bundesrath* will defeat it (14 out of 58). In France (secs. 411, 412) constitutional amendments pass as ordinary laws do, except that they must be adopted by the two houses of the legislature acting, not

separately in Paris, but jointly at Versailles, as a National Assembly. In Switzerland such amendments must pass both houses of the federal legislature and must also be approved, in a popular vote, by a majority of the voters, *and* by a majority of the Cantons (sec. 698). In England the distinction between constitutional law and statute law can hardly be said to exist (see sec. 917). See, also, for a further exposition of constitutional differences between modern states, Chap. XII.

1265. **The Federal Territory.** — The territory of the United States is of two different sorts: there is (*a*) the District of Columbia, over which the nation exercises exclusive jurisdiction as the seat of its government, and the arsenals and dock-yards, which it has acquired by purchase, and over which the states have given it jurisdiction for military purposes; and (*b*) the great national property, the territories, which the federal authorities hold in trust for the nation as a seed-bed for the development of new states.

1266. **The District of Columbia.** — It would have been inconvenient for the federal government to have no territory of its own on which to build its public offices and legislative halls, and where it could be independent of local or other state regulations. The Constitution itself therefore provided that Congress should have exclusive authority within any district not more than ten miles square which any state might grant to the federal government for its own uses. Acting upon this hint, Maryland and Virginia promptly granted the necessary territorial jurisdiction, it having been decided to establish the seat of government upon the Potomac. A part of the home-land of the federal government, thus ceded, was laid out under the name of the *District of Columbia:* there the public buildings were erected, and there, after the removal of the government offices thither in 1800, the city of Washington grew up.

1267. The first Congress of the United States met in New York City; there the first President was inaugurated, and the organization of the new government effected. In 1790 it was determined that the federal officers should live and Congress meet in Philadelphia (as the Continental Congress had generally done) for ten years; after that, in the district specially set apart for the use of the federal government.

1268. The creation of this federal home-plot is a feature peculiar to our own federal arrangements. Berlin is the capital of Prussia, not

the exclusive seat, or in any sense the property, of the imperial government. Berne, too, is cantonal, not federal, ground. Our government would have been in the same case as those of Germany and Switzerland had our federal authorities remained the guests of New York or Pennsylvania.

1269. The several *arsenals, dock-yards, forts, and light houses* established by the federal government in different parts of the Union are built upon land purchased by the federal government, generally of individuals. It is the practice for the several states in which such pieces of property lie to grant to the federal government exclusive jurisdiction over them, — usually with the proviso that the jurisdiction shall lapse when the property ceases to be used for the federal purposes specified.

1270. **The Territories.** — As the different parts of our vast national domain have been settled it has been divided, under the direction of Congress, into portions of various sizes, generally about the area of the larger states, though sometimes larger than any state save Texas. These portions have been called, for want of a better name, *Territories*, and have been given governments constituted by federal statute. First they have been given governors and judges appointed by the President; then, as their population has become numerous and sufficiently settled in its ways of living, they have been given legislatures chosen by their own people and clothed with the power to make laws subject to the approval of Congress; finally, upon becoming still more developed, they have been granted as full law-making powers as the states. The territorial stage of their development passed, the most important of them have one by one been brought into the Union as states.

1271. Until 1803 the only territory of the United States consisted of the lands this side the Mississippi which had belonged to the thirteen original states individually, and had by them been granted to the general government. In 1803 the vast tract known as 'Louisiana' was bought; in 1848, by conquest, and in 1852, by negotiation, the Pacific coast lands were acquired from Mexico; in 1846 the right of the United States to a portion of "the Oregon country" was finally established, by treaty.

1272. **The post-offices, federal court chambers, custom houses,** and other like buildings erected and owned by the general government in various parts of the country are held by the government upon the ordinary principles of ownership, just as they might be held by a private corporation. Their sites are not separate federal territory.

1273. **Congress.** — As in the states, so in the federal government, the law-making power is vested in a double legislature, a Congress consisting of a Senate and a House of Representatives. Unlike the two houses of a state legislature, however, the two houses of Congress have distinct characters: the Senate differs from the House not only in the number of its members, but also in the principle of its composition. It represents the federal principle upon which the government rests, for its members represent the states. The House of Representatives, on the other hand, represents the national principle upon which also the government has now been finally established, without threat of change. Its members represent the people.

1274. **The Senate.** — The Senate consists of two representatives from each of the states of the Union. It has, therefore, the states being forty-five in number (1897), ninety members. Each senator is elected, for a term of six years, by the legislature of the state which he represents; and a state legislature is legally free to choose any one as senator who has been a citizen of the United States nine years, who has reached the age of thirty, and who is at the time of the election a resident of the state which he is chosen to represent.

1275. The Constitution directed that, immediately after coming together for its first session, the Senate should divide its members, by lot, as nearly as it could into three equal groups; that the members assigned to one of these groups should vacate their seats after the expiration of two years, the members assigned to another after the expiration of four years, and the members of the third after the expiration of six years; after which arrangement had been accomplished, the term of every senator was to be six years as provided. It was thus brought about that one-third of the membership of the Senate is renewed by election every two years. The result is, that the Senate has a sort of continuous life, — no one election year affects the seats of more than one-third of its members.

1276. The Senate is, as I have said, the *federal* house of Congress. Its members represent the states as the constituent members of the Union. They are not, however, in any sense delegates of the governments of the states. They are not subject to be instructed as to their votes, as members of the German *Bundesrath* are, by any state authority (sec. 501), not even by the legislatures which elected them. Each senator is entitled and expected to vote

according to his own individual opinion. Senators, therefore, may be said to represent, not the governments of the states, but the people of the states organized as corporate bodies politic.

1277. There is no rule which obliges senators from the same state to vote together, after the fashion once imperative in the Congress of our own Confederation (sec. 1068), and still imperative in the German *Bundesrath* (sec. 501). Each senator represents his state, not in partnership, but singly.

1278. The *equal* representation of the states in the Senate more strictly conforms to the federal principle than does the unequal representation characteristic of the German *Bundesrath* (sec. 501); but the rule observed in Germany, that the representatives of each state must vote together, must, in turn, be admitted to be more strictly consistent with the idea of state representation than is the rule of individual voting followed in our Senate.

1279. **The Vice-President of the United States** is president of the Senate. Unless the President die, this is the only function of the Vice-President. He is not a member of the Senate; he simply presides over its sessions. He has a vote only when the votes of the senators are equally divided upon some question and his vote becomes necessary for a decision. If the President die or resign, or be removed from office, or be rendered unable "to discharge the duties and powers" of his office, the presidency devolves on the Vice-President.

1280. **Organization of the Senate.** — The Senate makes its own rules of procedure, the Vice-President being of course bound to administer whatever rule it adopts. Naturally the internal organization of the body is the matter with which its rules principally concern themselves, and the most important feature of that organization is the division of the members of the Senate into standing committees; into small groups, that is, to each of which is entrusted the preparation of a certain part of the Senate's business. The Senate itself would not have time to look into the antecedents and particulars, the merits and bearings, of every matter brought before it; these committees are, therefore, constituted to act in its stead in the preliminary examination and shaping of the measures to be voted on. Whenever any proposal is made concerning any important question, that proposal is referred to the standing committee which has been

commissioned to consider questions of the class to which the proposed action belongs. The committee takes the proposal under consideration, in connection with all other pending proposals relating to the same subject, and reports to the Senate what it thinks ought to be done with reference to it, — whether it is advisable to take any action or not, and, if it is advisable to act, what action had best be taken.

1281. Thus there is a Committee on Finance, to which all questions affecting the revenue are referred; a Committee on Appropriations, which advises the Senate concerning all votes for the spending of moneys; a Committee on Railroads, which considers all railroad questions; a Committee on Foreign Affairs, which prepares for consideration all questions touching our relations with foreign governments, etc.

1282. **Influence of the Standing Committees.** — Its standing committees have a very great influence upon the action of the Senate. The Senate is naturally always inclined to listen to their advice, for each committee necessarily knows much more about the subjects assigned to it for consideration than the rest of the senators can know. Its committee organization may be said to be of the essence of the legislative action of the Senate: for the leadership to which a legislative body consigns itself is of the essence of its method and must affect, not the outward form merely, but the whole character also of its action. Under every great system of government except our own, leadership in legislation belongs for the most part to the ministers, to the Executive, which stands nearest to the business of governing; it is a central, and, as evidenced by its results, extremely important characteristic of our system that our legislatures *lead themselves*, or, rather, that they suffer themselves to be led along the several lines of legislation by separate and disconnected groups of their members.

1283. **The Senate and the Executive.** — One of the chief uses of the committees is to obtain information for the Senate concerning the affairs of the government. But, inasmuch as the executive branch of the government is quite separate from Congress, it is often very difficult for the Senate to find out through its committees all that it wishes to know about the condition of affairs in the executive departments. The action of the two houses upon some questions must of course be greatly influenced, and

should be greatly influenced, by what they can learn of administrative experience in the departments, and the Senate, as well as the House, has the right to ask what questions it pleases of executive officers, either through its committees or by requiring a written report to be made directly to itself by some head of a department. Upon financial questions, for example, the Senate or its Finance Committee must constantly wish to know the experience of the Treasury. But it is not always easy to get legislative questions fully and correctly answered; for the officers of the government are in no way responsible to either house for their official conduct. They belong to an entirely separate and independent branch of the government: only such high crimes and misdemeanors as lay them open to impeachment expose them to the power of the houses. The committees are, therefore, frequently prevented from doing their work of inquiry well, and the Senate has to act in the dark. Under other systems of government, as we have seen (secs. 427, 428, 533, *et seq.*, 580, 670, 868—871, etc.), the ministers are always present in the legislative bodies to be questioned and dealt with directly, face to face.

1284. **The President Pro Tempore.** — It is the practice of the Senate to make itself independent of all chances of the Vice-President's absence by electing statedly from its own membership a president *pro tempore*, to act in case of the absence or disability of the Vice-President.

1285. **The House of Representatives.** — The House of Representatives represents, not the states, but the people of the United States. It represents them, however, not in the mass, but by states. Representation is apportioned among the states severally according to population, and no electoral district crosses any state boundary. (Compare secs. 517, 687.)

1286. **Apportionment of Representatives.** — Congress itself decides by law how many representatives there shall be; it then divides the number decided upon among the states according to population; after which each state is divided by its own legislature into as many districts as it is to have representatives, and the people of each of these districts are entitled to elect one member to the House. The only limitation put by the Constitution itself upon the number of representatives is, that there shall never be more than one for every thirty thousand inhabitants. The first House of Representatives had, by direction of the Constitution itself, sixty-five members, upon the proportion of one to every thirty-three thousand inhabitants. The number has, of course, grown, and the proportion decreased, with the

growth of population. A census is taken every ten years, and the rule is to effect readjustments and a redistribution of representation after every census.

1287. In states which send but one representative (there are now — 1897 — seven of these), the representative is chosen by the voters of the whole state. In some of the other states also it sometimes happens that one or more representatives are chosen thus 'at large,' pending a redistribution among districts, — or for some other reason.

1288. At present there are three hundred and fifty-seven members in the House, and the states are given one member for every 173,905 of their inhabitants. In cases where a state has many thousands more than an even number of times that many inhabitants, it is given an additional member to represent the balance. Thus, if it have four times 173,905 inhabitants and a very large fraction over, it is given five members instead of four only. If any state have less than 173,905, it is given one member, notwithstanding, being entitled to at least one by constitutional provision. The reason for allowing a state an extra representative when there is a large fraction remaining over after a division of its population by the standard number is that the apportionment of representatives is made according to states, and not by an even allotment among the people of the country taken as a whole, and that under such a system a perfectly equal division of representation is practically impossible. Congress makes the most equitable arrangement practicable each time it reapportions the membership of the House upon the basis of the decennial census which Congress directs to be taken for this purpose in pursuance of a special constitutional command.

1289. **Elections to the House.** — Any one may be chosen a representative who has reached the age of twenty-five years, has been a citizen of the United States for seven years, and is at the time of his election an inhabitant of the state from which he is chosen. The term of a representative is two years: and two years is also the term of the whole House; for its members are not chosen a section at a time, as the senators are; the whole membership of the House is renewed every second year. Each biennial election creates 'a new House.'

1290. Although the Senate has a continuous life, we speak habitually of different 'Congresses,' as if a new *Congress*, instead of a new House of Representatives merely, were chosen biennially. Thus the Congress of

1895–1897 was known as the fifty-fourth Congress, because the House of Representatives of that period was the fifty-fourth that had been elected since the government was established.

1291. Federal law does not determine who shall vote for members of the House of Representatives. The Constitution provides, simply, that all those persons in each state who are qualified under the constitution and laws of the state to vote for members of the larger of the two houses of the state legislature may vote also for members of the House of Representatives of the United States. The franchise is regulated, therefore, entirely by state law.

1292. **In the fourteenth amendment** to the Constitution (passed 1866–1868) a very great pressure is, by intention at least, brought to bear upon the states to induce them to make their franchise as wide as their adult male population. For that amendment provides that, should any state deny to any of its male citizens who are twenty-one years of age the privilege of voting for members of the more numerous branch of its own legislature (and thus, by consequence, the privilege of voting for representatives in Congress), for any reason except that they have committed crime, its representation in Congress shall be curtailed in the same proportion that the number of persons thus excluded from the franchise bears to the whole number of male citizens twenty-one years of age in the state. This provision has in practice, however, proved of little value. It is practically impossible for the federal authorities to carry it satisfactorily into effect.

1293. **Organization of the House.** — The House, like the Senate, has its own rules, regulative of the number and duties of its officers and of its methods of doing business; and these rules, like those of the Senate, are chiefly concerned with the creation and the privileges of a great number of standing committees. The committees of the House are not, however, elected by ballot, as the committees of the Senate are; they are appointed by the presiding officer of the House, the 'Speaker'; and this power of the Speaker to appoint the committees of the House makes him one of the most powerful officers in the whole government. For the committees of the House are even more influential than those of the Senate in determining what shall be done with reference to matters referred to them. They as a matter of fact have it in their power to control almost all the

acts of the House. The Senate, being a comparatively small body, has time to consider very fully the reports of its committees, and generally manages to shape its own conclusions. But the House is too large to do much debating: it must be guided by its committees or it must do nothing. It is this fact which makes the Speaker's power of appointment so vastly important. He determines who shall be on the committees, and the committees determine what the House shall do. He nominates those who shape legislation. More than that, he shapes the rules and determines the course of business. For he is chairman of the Committee on Rules, which has but two other members, whom he regards as his 'assistants,' and that committee guides the House quite absolutely in the use of its time. The Speaker will not 'recognize' (that is, will not give the floor to) any member who seeks to upset the programme it has fixed.

1294. The extraordinary power of the Speaker often makes his election a very exciting part of the business of each new House: for he is always selected with reference to what he will do in constituting the principal committees, and in shaping and administering the rules.

1295. The House of Representatives is not given a president by the Constitution, as the Senate is. It elects its own presiding officer, whose name, of 'Speaker,' is taken from the usage of the English House of Commons, whose president was so called because whenever, in the old days, the Commons went into the presence of the king for the purpose of laying some matter before him, or of answering a summons from him, their president was their spokesman or Speaker. This name is used also in the legislative bodies of all the English colonies, — wherever, indeed, English legislative practices have been directly inherited.

1296. The House has so many standing committees that every representative is a member of one or another of them, — but many of the committees have little or nothing to do. Some of them, though still regularly appointed, have no duties assigned them by the rules. One of the most important committees is that on Appropriations, which has charge of the general money-spending bills introduced every year to meet the expenses of the government, and which, by virtue of its power under the rules to bring its reports to the consideration of the House at any time, to the thrusting aside of whatever matter, virtually dominates the House by controlling its use of its time. Special appropriation bills, which propose to provide moneys for the expenses of single departments, — as, for example, the Navy Department or the War Department, — are, by a recent rule of the House, taken out of the hands of the

Committee on Appropriations and given to the committees on the special departments concerned. Scarcely less important than the Committee on Appropriations, though scarcely so busy as it, is the Committee on Ways and Means, which has charge of questions of taxation. It is, of course, to the appointment of such committees that the Speaker pays most attention. Through them his influence is most potent.

1297. Some members of the House are considered to be entitled, because of their long service and experience in Congress, to be put on important committees, and on every committee there must, by imperative custom, be representatives of both parties in the House. But these partial limitations upon the Speaker's choice do not often seriously hamper him in exercising his preferences.

1298. The House has to depend, just as the Senate does, upon its standing committees for information concerning the affairs of the government and the policy of the executive departments, and is just as often and as much embarrassed because of its entire exclusion from easy, informal, and regular intercourse with the departments. They cannot advise the House unless they are asked for their advice; and the House cannot ask for their advice except indirectly through its committees, or formally by requiring written reports.

1299. **Acts of Congress.** — In order to become a law or Act of Congress a bill must pass both houses and receive the signature of the President. Such is the ordinary process of legislation. But the President may withhold his signature, and in that case the measure which he has refused to sanction must receive the votes of two-thirds of the members of each house, given upon a reconsideration, before it can go upon the statute book. The President is given ten days for the consideration of each measure. If he take no action upon it within the ten days, or if within that period he sign it, its provisions become law; if within the ten days he inform Congress by special message that he will not sign the bill, returning it to the house in which it originated with a statement of his reasons for not signing it, another passage of the measure by a majority of two-thirds in each house is required to make it a law.

1300. There are, therefore, three ways in which a bill may become law: either (*a*) by receiving the approval of a majority in each house, and the signature of the President, appended within ten days after its passage

by the houses; or (*b*) by receiving the approval of a majority in each house, and not being acted upon by the President within ten days after its passage; or (*c*) by receiving the approval of two-thirds of each house after having been refused signature by the President within ten days after its passage by a majority in each house. If Congress adjourn before the expiration of the ten days allowed the President to consider bills sent him, such bills lapse unless he has signed them before the adjournment.

1301. Neither house can do any business (except send for absent members or adjourn) unless a majority of its members are present, — a majority being in the case of all our legislatures, both state and federal, the necessary *quorum*.

1302. In the practice of some foreign legislatures the *quorum* is much less than a majority of the members. In the English House of Commons, for instance, it is only forty members, although the total number of members of the House of Commons is six hundred and seventy.

1303. When it is said that under certain circumstances a bill must be passed by a vote of two-thirds in order to become a law, it is understood to mean that it must be voted for by two-thirds of the members *present*, not necessarily by that proportion of the whole membership of the body. In the case of bills which the President refuses to sign, however, the Constitution expressly says that it cannot be made law unless a second time passed by *two-thirds of each house*.

1304. A bill may 'originate' in either house, unless it be a bill relating to the raising of revenue. In that case it must originate in the House of Representatives, though the Senate may propose what amendments it pleases to a revenue bill, as to any other which comes to it from the House.

1305. If one of the houses pass a bill, and the other house amend it, the changes so proposed must be adopted by the house in which the bill originated before it can be sent to the President and be made a law. When the two houses disagree about amendments they appoint conference committees; that is to say, each house appoints a committee to consult with a similar committee appointed by the other house, to see what can be done towards bringing about an agreement between the two houses upon the points in dispute.

1306. **The Federal Judiciary: its Jurisdiction.** — The Judiciary of the United States consists of a Supreme Court, nine Circuit Courts of Appeals, nine Circuit Courts, sixty-eight District Courts, and a Court of Claims. Its organization and functions rest more

than do those of either of the other branches of the general government upon statute merely, instead of upon constitutional provision. The Constitution declares that "the judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the Congress may, from time to time, ordain and establish," and that "the judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office." It provides also that the judicial power of the federal government shall extend to all cases in law or equity which may arise under the Constitution, laws, or treaties of the United States; to all cases affecting ambassadors, other public ministers, and consuls; to all admiralty and maritime cases; to controversies in which the United Stated is a party, controversies between two or more states, between a state and citizens of another state (the state being the suitor), between citizens of different states, between citizens of the same state claiming lands under grants from different states, and between a state or its citizens and foreign states, citizens, or subjects. And it directs that in cases affecting ambassadors, other public ministers and consuls, and in cases in which a state is a party the Supreme Court shall have original jurisdiction; while in all other cases it is to have appellate jurisdiction only, "with such exceptions, and under such regulations, as the Congress shall make."

1307. The judicial power of the federal government is thus made to embrace two distinct classes of cases: (*a*) those in which it is manifestly proper that its authority, rather than the authority of a state, should control, *because of the nature of the questions involved:* for instance, admiralty and maritime cases, navigable waters being within the exclusive jurisdiction of the federal authorities; and cases arising out of the Constitution, laws, or treaties of the United States or out of conflicting grants made by different states. (*b*) Those in which, *because of the nature of the parties to the suit*, the state courts could not properly be allowed jurisdiction; cases affecting, for instance, foreign ambassadors, who are accredited to the government of the United States and with whom our only relations are national relations, whose privileges rest upon the sovereignty of the states they represent; or cases in which the state courts could not have complete jurisdiction because of the residence of

the parties; for instance, suits arising between citizens of different states. It is always open to the choice of a citizen of one state to sue a citizen of another state in the courts of the latter's own domicile, but the courts of the United States are the special forum provided for such cases.

1308. **Power of Congress over the Judiciary.** — But these provisions of the Constitution leave Congress quite free to distribute the powers thus set forth among the courts for whose organization it is to provide, and even, if it so chooses, to leave some of them entirely in abeyance. In other words, the Constitution defines the sphere which the judicial power of the United States *may* fill, while Congress determines how much of that sphere shall actually be occupied, by what courts and in what manner, subject to what rules and limitations.

1309. With regard to the organization of the judiciary Congress determines not only what courts shall be created inferior to the Supreme Court, but also of what number of judges the Supreme Court itself shall consist, what their compensation and procedure shall be, and what their specific duties in the administration of justice. It might also determine, should it see fit, what qualifications should be required of occupants of the supreme bench.

1310. **The Existing Federal Courts.** — In pursuance of these powers, Congress has passed the Judiciary Act of September, 1789, and the Acts amendatory thereto upon which the national judiciary system now rests. As at present constituted, the *Supreme Court* consists of a chief justice and eight associate justices. It is required to hold annual sessions in the city of Washington, — sessions which begin on the second Monday of each October, — any six of the justices constituting a quorum. Next below the Supreme Court are two sets of *Circuit courts*, called respectively Circuit Courts and Circuit Courts of Appeals. The Circuit courts are, in theory, courts held in different parts of the country by the justices of the Supreme Court sitting separately; but in reality the business of the Supreme Court is so great in amount and so engrossing in character that the justices can by no means regularly attend the sessions of the Circuit courts. The area of the United States (exclusive of the territories) is divided into nine circuits, one justice of the Supreme Court is assigned, by the appointment of the court itself, to each of these circuits, and

in addition special circuit judges are appointed who act quite independently of the justices, often holding court separately, in another part of the circuit, at the same time that the justices are themselves holding court in the same circuits. There are at present (1897) thirteen ordinary circuit judges, the first, third, fourth, fifth, and sixth circuits having one each, and the second, seventh, eighth, and ninth two each. The nine circuits are divided into sixty-eight districts, which, like Congressional districts, never cross state lines; and for each of these districts there has been established a district court. Some of the less populous states constitute each a single district; others are divided into two, while still others furnish sufficient business to warrant their being divided into three. The District courts are the lowest courts of the federal series, and have their own separate judges. The Circuit courts sit in the several districts of each circuit successively, and the law requires that each justice of the Supreme Court shall sit in each district of his circuit at least once every two years.

1311. **A Court of Appeals** was established by statute in 1891 for each of the nine circuits, in order to relieve the Supreme Court, in some degree, of the enormous pressure of business that had at last hopelessly congested its docket. In each circuit a justice of the Supreme Court and two circuit judges, or one circuit judge and one district judge, constitute the court of appeals for the circuit, and nine additional circuit judgeships were created by the act for this service, one for each circuit. The Circuit Court of Appeals is the only court in which the decisions of the Circuit and District courts can be reviewed in civil cases involving less than $1000; in cases in which the jurisdiction of the federal courts is based upon the character or residence of the parties; in patent cases, criminal cases less than capital, revenue cases, admiralty cases. In all such cases, however, the Supreme Court can assume jurisdiction if it will, by *certiorari* or otherwise; and the Circuit Courts of Appeals may themselves certify to that court such questions of law as they may deem it best it should pass upon. Appeals lie from the Circuit Courts of Appeals to the Supreme Court as of right in respect of questions of jurisdiction, in respect of all

constitutional questions or questions affecting treaties, in all prize cases, and in all cases of conviction for capital "or otherwise infamous" crimes.

1312. **The Court of Claims** was established in 1855, to relieve Congress of the necessity of determining the validity of claims against the United States, for the settlement or adjudication of which no provision had been made. It consists of a chief justice and four associates, and sits always in Washington. Pension claims, war claims, and claims already rejected were excluded from its jurisdiction; but all other claims against the United States, which are of such a kind that they could not be settled by an ordinary suit at law, in equity, or in admiralty (if the United States were suable like an individual) are referred to it. In some instances it is authorized to enter judgment; in others it can only find the facts; but in either case the claimant must wait for an appropriation by Congress for the satisfaction of his claim.

1313. **The Court of Private Land Claims** was established in 1891, to relieve Congress of the decision of various claims to lands lying within the territory derived by the United States from Mexico in cases where the claims were made by virtue of such Mexican or Spanish grants, concessions, warrants, or surveys as the United States is bound to recognize and confirm by reason of the terms of the treaties of cession by Mexico to the United States, — excluding, of course, such claims as have already been confirmed or finally disallowed by act of Congress or otherwise. The states within which such lands may lie are New Mexico, Arizona, Utah, Nevada, Colorado, and Wyoming. The court consists, like the Court of Claims, of one chief justice and four associates.

1314. **The Division of Jurisdiction** between the Circuit and District courts is effected by act of Congress; and, inasmuch as Congress has not seen fit to vest in the courts complete jurisdiction over *all* cases arising under the Constitution, laws, and treaties of the United States, but has given to each court power in certain specified cases, and left the rest in abeyance, it would be impossible to give in brief compass a detailed account of the jurisdiction of the several courts. It must suffice for present purposes to say, that the District courts are given cognizance of all ordinary civil cases falling within the federal jurisdiction (though if the sum involved exceed $2000 the suit may be brought in the Circuit Court); of all common law suits brought by the United States, all torts under international law or the treaties of the United States, suits against consuls or vice consuls, land condemnations, and all cases brought under the civil rights laws; and that they have exclusive original jurisdiction in postal law cases, prize cases, admiralty and maritime cases, and suits against the United States for money claims not exceeding $1000. The Circuit courts, on their part, are given jurisdiction in civil cases where the

sum involved exceeds $2000, in cases concerning patents, copyrights, or the revenue, in cases brought by the United States against national banks, in cases where the rights of citizens are asserted against state laws, and in certain enumerated cases of claims in law or equity against the United States. No pecuniary limit to appeals from District or Circuit courts to a Circuit Court of Appeals is mentioned in the act of 1891. In the trial of crimes punishable by federal law the jurisdiction of the District and Circuit courts is concurrent except in capital cases, over which the Circuit courts have exclusive jurisdiction.

1315. **All Judges of the United States** are appointed by the President, with and by the consent and advice of the Senate, to serve during good behavior. There are in all sixty-eight federal judicial districts, and for each of these, as a rule, a special district judge is appointed, though in large, thinly populated sections of the country it has been customary to have one judge hold court in several districts. Thus at present (1897) there are but sixty-five district judges.

1316. Federal judges of the inferior courts are, so to say, interchangeable. When necessary, a district judge can go into another district than his own and either aid or replace the district judge there. A district judge may also, when it is necessary for the despatch of business, sit as circuit judge; and a circuit judge may, in his turn, upon occasion hold District court. This seems the less anomalous when it is remembered that the earliest arrangement was, for the district judges to hold Circuit court always in the absence of the justices of the Supreme Court from circuit, or in conjunction with them, and that special circuit judges were appointed only because of the necessity for more judges consequent upon a rapid increase of federal judicial business.

1317. **The District Attorney and the Marshal.** — Almost every district has its own federal *district attorney* and its own United States *marshal*, both of whom are appointed by the President. It is the duty of the federal district attorney to prosecute all offenders against the criminal laws of the United States, to conduct all civil cases instituted in his district in behalf of the United States, and to appear for the defence in all cases instituted against the United States; to appear in defence of revenue officers of the United States where they are sued for illegal action, etc. The marshal is the ministerial officer of the federal Circuit and District courts. He executes all their

orders and processes, arrests and keeps all prisoners charged with criminal violation of federal law, etc., and has within each state the same powers, within the scope of United States law, that the sheriff of that state has under the laws of the state. He is the federal sheriff.

1318. The orders and processes of a state court are binding and operative only within the state to which the court belongs; the orders and processes of United States courts, on the contrary, are binding and operative over the entire Union.

1319. **The Courts of the District of Columbia and of the territories** are courts of the United States, but they are not federal courts; they bear, so far as their jurisdiction is concerned, the character of state and federal courts united. The only laws of the territories and of the District of Columbia are laws of the United States, inasmuch as the legislatures of the territories act under statutory grant from Congress.[1] The territorial legislatures are, so to say, commissioned by Congress; and the laws which they pass are administered by judges appointed by the President.

1320. The territorial courts and the courts of the District of Columbia do not come within the view of the Constitution at all. With reference to them Congress acts under no limitations of power whatever. The rule of tenure during good behavior, for example, which applies to all judges of the United States appointed under the Constitution, does not apply to judges of the territories or of the District of Columbia. The term of office of territorial judges is fixed at four years. The federal courts sitting in the states, and the United States courts established in the territories, ought not to be thought of as parts of the same system, although the Supreme Court is the highest tribunal of appeal for both.

1321. **The procedure of a federal court** follows, as a rule, the procedure of the courts of the state in which it is sitting; and state law is applied by the courts of the United States in all matters not touched by federal enactment. Juries are constituted, testimony taken, argument heard, etc., for the most part, according to the practice of the state courts; so that, so far as possible, both as regards the outward forms observed and the principles applied, a federal court is domestic, not foreign, to the state in which it acts.

[1] Congress early enacted that the people of the District of Columbia should continue to live under the laws which had previously had force in the District before its cession to the federal government.

1322. It is not within the privilege of Congress to delegate to the courts of the states the functions of courts of the United States; for the Constitution distinctly provides that, besides the Supreme Court, there shall be no court authorized to exercise the judicial powers of the United States except such as Congress "may, from time to time, ordain and *establish*." The adoption of state courts by Congress is excluded by plain implication. A very interesting contrast is thus established between the federal judicial system of the United States and the federal judicial systems of Germany and Switzerland (secs. 556, 703, 704).

1323. **The Federal Executive.** — "The executive power," says the Constitution, "shall be vested in a President of the United States of America," who "shall hold his office during a term of four years." Of course it is impossible for one man actually to exercise the whole executive power. The President is assisted by numerous heads of departments to whom falls so large a part of the actual duties of administration that it has become substantially correct to describe the President as simply presiding over and controlling by a general oversight the execution of the laws; which is doubtless all that the sagacious framers of the Constitution expected. The Vice-President has no part in the executive function. He is the President's substitute, and is chosen at the same time and in the same manner that the President is chosen.

1324. **Election of a President.** — The choice is not direct by the people, but indirect, through electors chosen by the people. In each state there are elected as many electors as the state has representatives and senators in Congress, the "electoral vote" of each state being thus equal to its total representation in Congress.

1325. The electors are voted for on the Tuesday following the first Monday of November in the year which immediately precedes the expiration of a presidential term. They assemble in the several state capitals to cast their votes on the second Monday of the January following. Their votes are counted in the houses of Congress sitting in joint session on the second Wednesday of the following February. The President is inaugurated on the fourth of March.

1326. **Practical Operation of the Plan: the Party Conventions.** — The original theory of this arrangement was that each elector was really to exercise an independent choice in the votes which he cast, voting for the men whom his own judgment had selected

for the posts of President and Vice-President. In fact, however, the electors only register party decisions made during the previous summer in national conventions. Each party holds during that summer a great convention composed of party delegates from all parts of the Union, and nominates the candidates of its choice for the presidency and vice-presidency. The electors, again, are, in their turn, chosen according to the nominations of party conventions in the several states; and the party which gains the most electors in the November elections puts its candidates into office through their votes, which are cast in obedience to the will of the party conventions as a matter of course. The party conventions, of which the constitution knows nothing, are in fact by far the most important part of the machinery of election.

1327. **Qualifications for the Office of President.** — "No person, except a natural-born citizen, or a citizen of the United States at the time of the adoption of this constitution shall be eligible to the office of president; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States."[1] In respect of age there is here only a slight advance upon the qualifications required of a senator; in respect of citizenship it is very much more rigorous than in the case of members of Congress.

1328. It is provided by the Constitution that the compensation received by judges of the United States shall not be diminished during their terms of office; concerning the President, whose tenure of office is much briefer, it is provided that his compensation shall neither be diminished *nor increased* during his term.

1329. **Duties and Powers of the President.** — It is the duty of the President to see that the laws of the United States are faithfully executed; he is made commander-in-chief of the army and navy of the United States, and of the militia of the several states when called into the actual service of the United States; he is to regulate the foreign relations of the country, receiving all foreign ministers and being authorized to make treaties with the assent of two-thirds of the Senate; he is to appoint and com-

[1] Constitution, Art. II., sec. i., par. 5.

mission all officers of the federal government; and he may grant reprieves and pardons. The Constitution makes all his appointments subject to confirmation by the Senate; but it also gives Congress the power to remove from the superintending view of the Senate the filling of all inferior official positions, by vesting the appointment of such subordinate officers as it thinks proper in the President alone, in the courts of law, or in the heads of departments. As a matter of fact, legislation has relieved the Senate of the supervision of the vast majority of executive appointments. The confirmation of the Senate is still necessary to the appointment of ambassadors, other public ministers, and consuls, of judges of the courts of the United States, of the chief military, naval, and departmental officials, of the principal post-office and customs officers, — of all the more important servants of the general government: but these constitute only a minority of all the persons receiving executive appointment. The majority are appointed without legislative oversight.

1330. The unfortunate, the demoralizing influences which have been allowed to determine executive appointments since President Jackson's time have affected appointments made subject to the Senate's confirmation hardly less than those made without its coöperation; senatorial scrutiny has not proved effectual for securing the proper constitution of the public service. Indeed, the "courtesy of the Senate," — the so-called "courtesy" by which senators allow appointments in the several states to be regulated by the preference of the senators of the predominant party from the states concerned, has frequently threatened to add to the improper motives of the Executive the equally improper motives of the Senate.

1331. **Reform of Methods of Appointment to Federal Offices.** — The attempts which have been made in recent years to reform by law the system of appointments have not been directed towards the higher offices filled with the consent of the Senate, but only towards those inferior offices which are filled by the single authority of the President or of the heads of the executive departments; have touched in their results, indeed, only the less important even among those offices. The Act which became law in June, 1883, and which is known as the "Pendleton Act," may

be said to cover only 'employees': it does not affect any person really *in authority*, though it does affect a large body of federal servants. It provides, in brief, for the appointment by the President, by and with the advice and consent of the Senate, of a *Civil Service Commission* consisting of three persons, not more than two of whom shall be adherents of the same political party, under whose recommendation as representatives of the President, selections shall be made for the lower grades of the federal service upon the basis of competitive examination. It forbids the solicitation of money from employees of the government for political uses, and all active party service on the part of members of the civil administration. It endeavors, in short, to "take the civil service out of politics."

1332. The carrying out of those portions of the Act which relate to the method of choosing public officers is, however, almost entirely subject to the pleasure of the President. The Constitution vests in him the power of appointment, subject to no limitation except the possible advice and consent of the Senate. Any Act which assumes to prescribe the manner in which the President shall make his choice of public servants must, therefore, be merely advisory. The President may accept its directions or not as he pleases. The only force that can hold him to the observance of its principle is the force of public opinion.

1333. **The Presidential Succession.** — In case of the removal, death, resignation, or disability of both the President and Vice-President, the office of President is to be filled *ad interim* by the Secretary of State, or, if he cannot act, by the Secretary of the Treasury, or, in case he cannot act, by the Secretary of War; and so on, in succession, by the Attorney-General, the Postmaster-General, the Secretary of the Navy, or the Secretary of the Interior. None of these officers can act, however, unless he have the qualifications as to age, citizenship, and residence required by the Constitution of occupants of the presidential chair. Until this arrangement was made, by act of Congress in 1886, the 'succession' passed first to the president *pro tempore* of the Senate, and, failing him, to the Speaker of the House of Representatives. This was found inconvenient because there are intervals now and again when there is neither a president *pro tempore* of the Senate nor a Speaker of the House. These officers, moreover, are by no means always of the same political party as the President and Vice-President. Some doubt was felt, too, as to whether they were 'officers' within the meaning of the Constitution, in the clause in which Congress is authorized to designate the 'officers' upon whom in such cases the presidential office was to devolve.

1334. **Relations of the Executive to Congress.** — The only provisions contained in the Constitution concerning the relation of the President to Congress are these: that "he shall, from time to time, give to the congress information of the state of the union, and recommend to their consideration such measures as he shall judge necessary and expedient"; and that "he may, on extraordinary occasions, convene both houses, or either of them," in extra session, "and, in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper," (Art. II., sec. iii). His power to inform Congress concerning the state of the union and to recommend to it the passage of measures is exercised only in the sending of annual and special written 'messages.'

1335. Washington and John Adams interpreted this clause to mean that they might address Congress in person, as the sovereign in England may do: and their annual communications to Congress were spoken addresses. But Jefferson, the third President, being an ineffective speaker, this habit was discontinued and the fashion of written messages was inaugurated and firmly established. (Compare sec. 861.) Possibly, had the President not so closed the matter against new adjustments, this clause of the Constitution might legitimately have been made the foundation for a much more habitual and informal, and yet at the same time much more public and responsible, interchange of opinion between the Executive and Congress. Having been interpreted, however, to exclude the President from any but the most formal and ineffectual utterance of advice, our federal executive and legislature have been shut off from coöperation and mutual confidence to an extent to which no other modern system furnishes a parallel. In all other modern governments the heads of the administrative departments are given the right to sit in the legislative body and to take part in its proceedings. The legislature and executive are thus associated in such a way that the ministers of state can lead the houses without dictating to them, and the ministers themselves be controlled without being misunderstood, — in such a way that the two parts of the government which should be most closely coördinated, the part, namely, by which the laws are made and the part by which the laws are executed, may be kept in close harmony and intimate coöperation, with the result of giving coherence to the action of the one and energy to the action of the other.

1336. **The Executive Departments.** — The Constitution does not explicitly provide for the creation of executive departments,

but it takes it for granted that such departments will be created. Thus it says (Art. II., sec. ii., par. 1, 2) that the President "may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices," and that Congress may vest the appointment of such inferior officers as it may see fit "in the heads of departments." The executive departments consequently owe their creation and organization to statute only.

1337. The first Congress erected three such departments, namely, the departments of State, of the Treasury, and of War; providing, besides, for the creation and exercise of the office of Attorney-General, but not erecting a Department of Justice. In 1798 the management of the navy, which had at first been included in the duties of the War Department, was intrusted to a special Department of the Navy; in 1829 the post-office, which had been a subdivision of the Treasury, was created an independent Department; and in 1849 a Department of the Interior was organized to receive a miscellany of functions not easy to classify, except in the feature of not belonging properly within any department previously created. In 1870 the Attorney-General was put at the head of a regularly constituted Department of Justice; and in 1889 the Department of Agriculture, which had existed as a subordinate executive bureau since 1862, was given full standing under a Secretary of 'cabinet' rank.

A character like that of the Department of the Interior, it is interesting to remark, may be attributed to some corresponding department, bearing either this name or a name of like significance, in almost every other modern government. There is everywhere some department of state to receive functions not otherwise specially disposed of.

1338. We have, thus, at present, eight executive departments, viz.: (1) **A Department of State**, which is what would be called in most other governments our "foreign office," having charge of all the relations of the United States with foreign countries.

1339. (2) **A Department of the Treasury**, which is the financial agency of the government, and whose functions cover the collection of the public revenues accruing through the customs duties and the internal revenue taxes, their safe keeping and their disbursement in accordance with the appropriations from time to

time made by Congress; the auditing of the accounts of all departments; the supervision and regulation of the national banks and of the currency of the United States; the coinage of money; and the collection of certain industrial and other statistics. This Department, therefore, contains within it the treasury and comptrolling functions which in the states are separated.

1340. To this Department is attached also the *Bureau of Printing and Engraving*, by which all the printing of the paper currency, bonds, and revenue stamps of the government is done. The Treasury Department has also charge of the Coast and Geodetic Survey, of marine hospitals, the maintenance of lighthouses, and of the Life Saving Service.

1341. (3) **A Department of War**, which has charge of the military forces and defences of the Union. It has charge of the Military Academy at West Point, and supervision of the various military schools to which Congress gives aid.

1342. (4) **A Department of the Navy**, which has charge of the naval forces of the general government; and which has charge of the Naval Academy at Annapolis and the Naval War College at Newport.

1343. (5) **A Department of Justice**, from which emanates all the legal advice of which the federal authorities stand in need at any time, and to which is intrusted the supervision of the conduct of all litigation in which the United States may be concerned. To it are subordinate all the marshals and district attorneys of the United States, — all ministerial, non-judicial law officers, that is, in the service of the government. It may be compendiously described as the lawyer force of the government. It is presided over by an Attorney-General, all the other departments, except the Post-Office, being under 'Secretaries.'

1344. (6) **A Post-office Department**, under a Postmaster-General, which is charged with the carrying and delivery of letters and parcels, with the transmission of money by means of certain 'money orders' issued by the Department, or under cover of a careful system of registration, and with making the proper postal arrangements with foreign countries.

1345. These arrangements with foreign countries may be made without the full formalities of treaty, the consent of the President alone being necessary for the ratification of international agreements made by the

Postmaster-General for the facilitation of the functions of the Department. The United States is a member of the Universal Postal Union, to which most of the civilized countries of the world belong. The central office of this Union is under the management of the Swiss administration. Its administrative expenses are defrayed by contribution of the various governments belonging to the Union.

1346. (7) **A Department of the Interior,** which has charge (i.) Of the taking of the Census, as from time to time ordered by Congress in accordance with the provision of the Constitution (Art. I., sec. i., par. 3) which makes it the duty of Congress to have a census taken every ten years as a basis for the redistribution of representation in the House of Representatives among the several states; (ii.) Of the management of the public lands (*General Land Office*); (iii.) Of the government's dealings with the Indians, a function which is exercised through a special Commissioner of Indian Affairs in Washington and various agencies established in different parts of the Indian country.

1347. It is through this *Indian Bureau*, for example, that all laws concerning the settlement, assistance, or supervision of the tribes are administered, as well as all laws concerning the payment of claims made upon the federal government for compensation for depredations committed by the Indians, and laws touching the distribution and tenure of land among the Indians.

1348. (iv.) Of the paying of pensions and the distribution of bounty lands, a function which it exercises through a special *Commissioner of Pensions;* (v.) Of the issuing and recording of patents and the preservation of the models of all machines patented. For the performance of these duties there is a *Patent Office.* (vi.) Of the keeping and distribution of all public documents (*Superintendent of Public Documents*); (vii.) Of the auditing of the accounts of certain railway companies, to which the United States government has granted loans or subsidies, and the enforcing of the laws passed by Congress with reference to such roads (*Office of the Commissioner of Railroads*); (viii.) Of the collection of statistical and other information concerning education, and the diffusion of the information so collected for the purpose of aiding the advance and systematization of education throughout the country (*The Office of Education*); (ix.) Of the superintendence of the government hospital for the insane and

the Columbia Asylum for the Deaf and Dumb; (x.) Of the Geological Survey; (xi.) Of the Freedmen's Hospital and the Howard University.

1349. Many of these subdivisions of the Interior, though in strictness subject to the oversight and control of the Secretary of the Interior, have in reality a very considerable play of independent movement.

1350. (8) **A Department of Agriculture**, which is charged with furthering in every possible way, by the collection of information not only, but also by the prosecution of scientific investigation with reference to the diseases of plants, etc., the agricultural interests of the country, and under which there are maintained a special *Forestry Division*, and the national Weather Bureau.

1351. Set apart to themselves, and therefore without representation in the Cabinet, there are (1) The *Department of Labor*, which is charged with the collection and publication of statistical and other information touching the condition and interests of laborers, — information, for instance, bearing upon the relations of labor and capital, hours of labor, the housing of laborers, rates of wages and methods of payment, the food and expenses of laborers, etc. (2) The *Interstate Commerce Commission*, a semi-judicial body by which the federal statutes forbidding unjust discrimination in railway rates in interstate freight or passenger traffic, prohibiting certain sorts of combinations in railroad management, etc., are interpreted and enforced. (3) The *Civil Service Commission* by which the Act mentioned in sec. 1331 is administered. (4) The *Commission of Fish and Fisheries*, whose duty it is to make the necessary investigations and prosecute the necessary measures for the preservation, improvement, and increase of the stock of fish in our rivers and lakes and on our coasts. (5) The Government Printing Office, which prints all public documents. (6) The Smithsonian Institution, the National Museum, and the Bureau of Ethnology.

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XII.

SUMMARY: CONSTITUTIONAL AND ADMINISTRATIVE DEVELOPMENTS.

1352. **Continuity of Development.** — From the dim morning hours of history until now, the law of coherence and continuity in political development has suffered no serious breach. Human choice has in all stages of the great world-processes of politics had its part in the shaping of institutions; but it has never been within its power to proceed by leaps and bounds: it has been confined to adaptation, altogether shut out from raw invention. Institutions, like morals, like all other forms of life and conduct, have had to wait upon the slow, the almost imperceptible formations of habit. The most absolute monarchs have had to learn the moods, observe the traditions, and respect the prejudices of their subjects; the most ardent reformers have had to learn that too far to outrun the more sluggish masses was to render themselves powerless. Revolution has always been followed by reaction, by a return to even less than the normal speed of political movement. Political growth refuses to be forced; and institutions have grown with the slow growth of social relationships; have changed in response, not to new theories, but to new circumstances.

1353. **The Order discoverable in Institutional Development** is not, indeed, the order of perfect uniformity: institutions, like the races which have developed them, have varied infinitely according to their environment. Climate, war, geographical situation, have shaped them: the infinite play of human thought, the infinite many-sidedness of human character have been reflected in them. But the great stages of development have remained throughout

clear and almost free from considerable irregularities. Tested by history's long measurements, the lines of advance are seen to be singularly straight.

1354. **Course of Development in the Ancient World.** — If the bond of kinship was at first clear and unmistakable, it must ere long have become much less defined in the broadened Family. When the Family became merged in the still wider Community, solidarity remained and a strong *sense* of kinship, but the reality of kinship had no doubt largely departed, and law had begun to take on a public character, to bear the sanction of all rather than the sanction of a single supreme person. Kinship was typified still in the hereditary character of the kingship; but the king was now the representative of the community rather than its master. The Community developed into the city-state: and further than this the ancient peoples did not go. In Rome and in the great city-states of Greece the conception of *citizenship* supplanted the idea of kinship. The state became virtually personified in the thought of the time. It was the centre of civic affection and the object of all civic virtue. The public officer ruled not in his own name but in the name of the State. Around Rome at last there grew up a vast Empire; but it was *Rome's* Empire, — the world had fallen into the hands of a city, and the only citizenship that Caracalla could bestow was the citizenship of Rome. This city-statehood was the last word of the ancient world in politics.

1355. **The Feudal System and the Modern Monarch.** — When the Germans emerge upon the European field we have the State in a new aspect. Nations are moving in arms, and the Host is the State. Commanders of Hosts are the kings of the new order of things. The Host settles on the lands of the old Roman dominions, and that military tenure is developed which we have learned to call the Feudal System. This Feudal System, when it has worked its perfect work, in such countries as France and Germany, brings forth still a third type of kinship: we presently have the king who *owns* his kingdom as supreme feudal lord: the king who, having absorbed fief after fief, at last possesses his kingdom by a perfected legal title; the king whose realm is his estate. This is the king who becomes the sole source of law and of justice,

the king who, in our day, has granted out of his abundant grace rights and constitutions to his people.

1356. **England's Contribution.** — Where the Feudal System fails of its full fruitage, as in England, where freehold estates are not entirely blotted out, where tenure of the king as overlord is a theory but never a reality, and where local self-government obtains a lasting rootage in the national habit, political development takes another course. There political liberty abides continually, in one form or another, with the people, and it is their operative power which gives to liberty expansion, and which finally creates the constitutional state, the limited monarchy, the free self-governing nation. Out of the fief grew the kingdom; out of the freehold and local self-government grew the constitutional state; out of the constitutional state grew that greatest of political developments, the free, organic, self-conscious, self-directing nation, with its great organs of popular representation and its constitutional guarantees of liberty.

1357. **The Romans and the English.** — In the general history of European development two nations stand forth preëminent for their political capacity: the Roman nation, which welded the whole ancient world together under one great organic system of government, and which has given to the modern world the groundwork of its systems of law; and the English nation, which gave birth to America, which has "dotted over the whole surface of the globe with her possessions and military posts," and from which all the great nations of our time have borrowed much of their political thought and more of their political practice. And what is most noteworthy is this, that these two nations closely resemble each other, not only in the mental peculiarities which constitute the chief element of their political strength, but also in the institutional foundations which they have successively laid for their political achievements.

1358. **Likenesses between the Two Imperial Nations.** — Both have been much stronger in creating and working institutions than in explaining them: both of them have framed such a philosophy as they chose to entertain 'after the fact': neither has been too curious in examining the causes of its success or in working out logical sequences of practice. Above all, neither has suffered any

taint of artificial thoroughness to attach itself to its political methods. Slowly, and without much concern for theories of government, each has made compromise its method, adaptation its standing procedure. Illogical, unimaginative their mode of procedure must be said to have been throughout, a mode for slow, practical men, without speed or boldness. Revolution has never fallen within their calculations; even change they have seldom consciously undertaken. If old institutions must perish, they must perish within the Roman or English system by decay, by disuse, not by deliberate destruction: if new institutions must be constructed, they must be grafted on the old in such wise that they may at least seem to be parts of the same stock, and may partake as largely as may be of that one vitalizing sap, old custom. As the Roman Senate, from being the chief motive power of the state, came at last to exercise only such prerogatives as the people and the people's officers suffered it to retain, so the English House of Lords, from being the single coadjutor of the king in legislation, has been reduced to a subordinate part which it plays only upon a sort of sufferance, and all without any sudden or premeditated step of revolution. As the consular power in Rome was slowly pared down to be dealt out in parts to plebeian officials, so has the royal power in England been piece by piece transferred to the hands of ministers, the people's representatives. The whole political method of the two peoples is the same: the method of change so gradual, so tempered with compromise and discretion, so retarded and moderated by persistent habit that only under the most extraordinary pressure is it ever hastened into actual revolution.

1359. **Popular Initiative in Rome and England.** — Doubtless much of this likeness of temperament and method is due to the fact that both in Rome and in England it has been the nation, and not merely a small governing class, which has been behind political change. The motive power was popular initiative: the process of change was the labored process of legislation, the piece-meal construction which is to be compounded out of the general thought. Measures have had in both cases to be prepared for the general acceptance; and popular action, wherever it is the wont for the people to act, is always conservative action. A king's law-

making is apt to be rapid, thorough, consistent; but a nation's law-making, devised and struggled for piece by piece, cannot be. The plebeians in Rome fighting inch by inch towards the privileges which they coveted, the people in England making their way by long-protracted efforts towards the control they desired to exercise, have had to advance with painful slowness, and to be content with one piece at a time of the power they strove for.

1360. **Rome's Change of System under the Empire.** — With the full establishment of imperial forms of government Rome lost the conservative habit of her republican period. The methods of the first emperor, indeed, were slow and cautious in the highest degree: Augustus avoided all show or name of imperial power. Carefully regardful of republican sentiment and spirit, which he knew to be not yet extinct, he simply accumulated to himself one by one every republican office, professing the while merely to exercise for somewhat extended periods, — periods which steadily lengthened from terms of years to tenure for life, — but by free gift of the Senate and people, the old offices of self-government. But later emperors were by no means so careful or so considerate of popular prejudices: their power was open, bold, oftentimes even wanton. And with these changes in the nature of the government came radical changes in political method: there came the wilful creation of new offices known to no Roman custom, the constant breach of old practices hallowed by immemorial Roman habit, — the whole familiar process, in brief, of arbitrary power. What Rome gained thus in discipline, in military efficiency, she lost in political capacity. For that capacity so characteristic of the Romans and the English, the capacity namely for political organization, is beyond question inseparably connected with popular initiative, with national self-direction, with self-government.[1]

1361. **Fundamental Contrast between English and Roman Political Method.** — The most striking contrast between the English and the Romans consists in a vital and far-reaching

[1] The student ought to test in detail this likeness between Rome and England. I can here only indicate in the most rapid way the line of study.

difference in political organization. What I have said touching the national action of the two peoples, the slow, conservative concert of the people as a whole in the origination and effectuation of policy must be understood in different senses in the two cases. It was true of the Romans only during the period of the Republic and while the Roman people could take a direct part in affairs. The Teuton brought into force, particularly in England, the principle of *representation*, that organization by representative assemblies which enabled the people to act over wide areas through trusted men elected to speak and act in their stead, and which thus enabled the organization of the nation to extend without loss of vitality. Of such methods the Roman knew nothing. Only the people of the city of Rome had any part in Roman legislation, for the Roman had conceived of no way of acting by a delegation of the law-making power on the part of the people. The equal and concerted action of widely diffused populations through the instrumentality of representation was utterly unknown to the ancient world. The county court with its reeve and four selected men from each township, the parliament with its knights from the shire and its burgesses from the towns, instrumentalities so familiar everywhere now that the world has gone to school to the English in politics, were for a long time peculiar to England in their best features. They were the peculiar fruit of Teutonic political organization where that organization had grown most apart from the Roman influence, in England, not on the Continent, penetrated as the continental lands were everywhere by the Roman example. Rome had had no similar means of holding her vast populations together in active political coöperation and living union. Therefore, as her conquests spread, her system became more and more centralized and autocratic. The English could hold populations together, however large they might be, by means of representative assemblies; but the Roman, who knew no method of admitting scattered peoples to a part in the central government, who knew no popular assemblies except those in which all citizens should be actually present and vote, could hold an extended empire together only by military force and the stern discipline of official subordination.

1362. **The Development of Legislatures.** — Perhaps the most distinguishing feature of modern as compared with ancient politics is the difference between the sphere, the mode, and the instrumentalities of legislation now, and the character and methods of legislation among the classical nations. Representative law-making bodies are among the common-place institutions of the political world as we know it: but no such assembly was ever dreamed of by any ancient politician, Greek or barbarian. Every citizen either took direct part in legislation or took no part in it at all. Aristotle believed, consequently, that no free state could exist with a wide territory or a population so scattered as to be unable to attend the assemblies. But what the Greeks and Romans did not know at all the Teuton seems to have known almost from the first: representation is one of the most matter-of-course devices of his native polity, and from him the modern world has received it.

1363. Our early colonial history furnishes at least two very curious examples of a transition from primary to representative assemblies. The earliest legislature of Maryland was a primary assembly composed of all the freemen of the colony; to the next assembly some were allowed to send proxies; and before representation was finally established there appeared the singular anomaly of a body partly representative, partly primary, at least one freeman insisting upon attending in person (Doyle, I., pp. 287–290). The other example is to be found in the history of Rhode Island, whose citizens for some time insisted upon meeting at Newport in primary assembly for the purpose of electing the persons who were to represent them in the colonial legislature, thus as it were jointly inaugurating the session, to use Mr. Foster's words, and then leaving the legislature "to run for itself for the remainder of the time" (W. E. Foster, *Town Government in Rhode Island*, p. 26).

1364. **The Powers of a Representative.** — But only very modern times have settled the theory of a representative's power. The strong tendency among all vigorously political, all self-reliant self-governing peoples has been to reduce their representatives to the position and functions of mere delegates, bound to act, not under the sole direction of their own judgments, but upon instruction from their constituents. The better thought of later times has, however, declared for a far different view of the representative's office, has claimed for the represent-

ative the privilege of following his own judgment upon public questions, of acting, not as the mouthpiece but rather as the fully empowered substitute of his constituents.

1365. **Scope of Modern Legislation.** — The question is of the greater importance because of the extraordinary scope of legislation in the modern state, and of the extreme complexity nowadays attaching to all legislative questions. Time was, in the infancy of national representative bodies, when the representatives of the people were called upon simply to give or refuse their assent to laws prepared by a king or by a privileged class in the state; but that time is far passed. The modern representative has to judge of the gravest affairs of government, and has to judge as an originator of policies. It is his duty to adjust every weighty plan, preside over every important reform, provide for every passing need of the state. All the motive power of government rests with him. His task, therefore, is as complex as the task of governing, and the task of governing is as complex as is the play of economic and social forces over which it has to preside. Law-making now moves with a freedom, now sweeps through a field unknown to any ancient legislator; it no longer provides for the simple needs of small city-states, but for the complex necessities of vast nations, numbering their tens of millions. If the representative be a mere delegate, local interests must clash and contend in legislation to the destruction of all unity and consistency in policy; if, however, the representative be not a mere delegate, but a fully empowered member of the central government, coherence, consistency, and power may be given to all national movements of self-direction.

1366. **The Making, Execution, and Interpretation of Law.** — The question of the place, character, and functions of legislation is in our days a very different question from any that faced the ancient politician. The separation of legislative, judicial, and executive functions is a quite modern development in politics, and we have questions to settle concerning the integration of these three functions which could not have arisen in any ancient state. In the early days when the family was the state; in the later days when the political organization, although it had lost the father's omnipotent jurisdiction, still rested upon the idea of

kinship; and even in still later times when forms of government inherited from these primitive conceptions still persisted, all the functions of government were vested in a single individual or in a single body of individuals, in a father-king or in an assembly of elders. Even in highly developed free states like Athens no adequate or complete recognition of any essential difference in the character of the several duties of the judge, the executive officer, and the law-maker is discoverable. It was a very modern conception that governmental functions ought to be parcelled out according to a careful classification. The ancient assembly made laws, elected officers, passed judgment upon offenders against the laws, and yet was conscious of no incongruity. It was before the day when any one could be shocked by such a confusion of powers.

1367. Modern politicians are, however, greatly shocked by such confusions of function. They insist, as of course, that every constitution shall separate the three 'departments' of government, and that these departments shall be in some real sense independent of each other; so that if one go wrong the others may check it by refusing to coöperate with it. In no enlightened modern system may the legislator force the judge, or the judge interfere with the privileges of the legislator, or judge or legislator wrongly control the executive officer.

1368. **Charters and Constitutions.** — This division of powers between distinct branches of government has been greatly emphasized and developed by the written constitutions so characteristic of modern political practice. These constitutions have by no means all had the same history, and they differ as widely in character as in origin; but in every case they give sharp definiteness to the organs and methods of government which illustrate the most salient points of modern political development. Our own constitutions, as we have seen (sec. 1062), originated in grants from the English crown, for which were substituted, in the days following the war for Independence, grants by the people. Originally royal, they are now national charters: and they have been kept close to the people, firmly based upon their direct and explicit sanction. The constitutions of Switzerland bear a like character: proceeding from the people, they rest in all points upon the people's continuing free choice.

1369. In France, on the contrary, the people have as yet had no direct part in constitution-making. French constitutions have in all cases been both made and adopted by constituent assemblies: at no stage are the people directly called upon for their opinion, — not even after the constitution has been formulated. Its adoption, like its construction, is a matter for the constituent assembly alone: it is given to the people, not accepted by them. The present constitution of the Republic was even framed and adopted by a convention which could show no indisputable right to act as a constituent assembly (sec. 396).

1370. **Creation vs. Confirmation of Liberties by Constitution.** — This process, of the gift of a constitution to the people by an assembly of their own choice, may be said to be intermediate between our own or the Swiss practice, on the one hand, and the practice of the monarchial states of Europe, on the other, whose constitutions are the gift of monarchs to their people. In many cases they have been forced from reluctant monarchs, as Magna Charta was wrung by the barons from John: but whether created by stress of revolution, as in so many states in 1848 (sec. 490), or framed later and more at leisure, as in Prussia (sec. 490), they have been in the form of royal gifts of right, have not confirmed but *created* liberties and privileges.

1371. Our own charters and constitutions have, on the contrary, been little more than formal statements of rights and immunities which had come to belong to Englishmen quite independently of royal gift or favor. The Acts of Parliament upon which the governments of such modern English colonies as Canada and Australia rest do scarcely more, aside from their outlining of forms of government, than extend to the colonists the immemorial privileges of Englishmen in England. And so our own colonial charters, besides providing for governors, courts, and legislatures, simply granted the usual rights of English freemen. Our constitutions have formulated our political progress, but the progress came first. European constitutions, on the other hand, have for the most part created the rights and immunities, as well as the popular institutions,

which they embody: they institute reform, instead of merely confirming and crystallizing it.

1372. **The Modern Federal State: contrasted with Confederations.** — In no part of modern political development have written constitutions played a more important, a more indispensable rôle than in the definite expression of the nice balance of institutions and functions upon which the carefully adjusted organism of the modern federal state depends. The federal state, as we know it, is a creation of modern politics. Ancient times afford many instances of confederated states, but none of a federal state. The mere confederations of ancient and of modern times, however long preserved, and of however distinguished history, were still not states in the proper sense of the term.

1373. The most prominent example of a confederation in ancient times was the celebrated Achæan League (sec. 92). In modern times we have had the early Swiss confederation (sec. 633), the several German confederacies (secs. 489, 491), and our own short-lived Confederation (sec. 1067).

1374. They were composed of states, and their only constituent law was treaty. They were themselves, as confederacies, without sovereign power: sovereignty remained unimpaired with their component states. Their members did not unite: they simply agreed, as equals, to act in concert touching certain matters of common interest.

1375. The modern federal state, on the contrary, is a single and complete political personality among nations: it is not a mere relationship existing between separate states, but is itself a State. To use two expressive German terms, a confederation is a *Staatenbund*, (a "Band of States") merely, while a federal state is a *Bundesstaat* (a "Banded State"). Confederation and federal state have this peculiarity in common, that they are both constituted by the association of distinct, independent communities: but under a confederation these communities practically remain distinct and independent, while within a federal state they are practically welded together into a single state, into one nation.

1376. Under both forms, however, it has proved possible to make provision for the association, upon the best terms of mutual help and support,

of communities unlike in almost every feature of local life, and even of communities diverse in race, without any surrender of their individuality or of their freedom to develop each its characteristic life. Nothing could well be conceived more flexible than a system which can hold together German, French, and Italian elements as the Swiss constitution does.

1377. **Distinguishing Marks of the Federal State.** — The federal state has, as contrasted with a federation, these distinguishing features: (*a*) a permanent surrender on the part of the constituent communities of their right to act independently of each other in matters which touch the common interest, and the consequent fusion of these communities, in respect of these matters, into what is practically a single state. As regards other states they have merged their individuality into one national whole: the lines which separate them are none of them on the outside but all on the inside. (*b*) The federal state possesses a special body of federal law and a special federal jurisprudence in which is expressed the national authority of the compound state. This is not a law agreed to by the constituent communities: as regards the federal law there are no constituent communities. It is the spoken will of the new community, the Union. (*c*) There results a new conception of sovereignty. The functions of political authority are parcelled out. In certain spheres of action the authorities of the Union are entitled to utter laws which are the supreme law of the land; in other spheres of action the constituent communities still act with the full autonomy of independent states. The one set of authorities is sovereign; for it presides, and the range of its powers is, in the last resort, determined by itself; but the other set of authorities exercises full dominion, though in a narrower sphere. Its powers are independent and self-sufficient, neither given nor subject to be taken away by the government of the Union, originative of rights, and exercised at will.

1378. All modern federal states have written constitutions; but a written constitution is not an essential characteristic of federalism, it is only a feature of high convenience; such delicate coördinate rights and functions as are characteristic of federalism must be carefully defined; each set of authorities must have its definite commission.

1379. It is not certain that the federal state, as at present established, is not a merely temporary phenomenon of politics. It is plain from the history of modern federal states, — a history as yet extremely brief, — that the strong tendency of such organization is towards the transmutation of the federal into a unitary state. After union is once firmly established, not in the interest only but also in the affections of the people, the drift would seem to be in all cases towards consolidation.

1380. **Existing Parallels and Contrasts in Organization.** — The differences which emerge most prominently upon a comparison of modern systems of government are differences of administrative organization chiefly and differences in the relationship borne by Executives to Legislatures.

1381. **Administrative Integration: Relation of Ministers to the Head of the Executive.** — One of the chief points of interest and importance touching any system of administration is the relation which the ministers of state bear to the head of the Executive. Of course much of the consistency and success of policy depends upon the presence or absence of a single guiding will: if ministers be without real leadership, they are apt to be without energy or success in policy, if not actually at odds with each other.

1382. Under our own system the heads of departments are brought together into at least nominal unity by their common subordination to the President. Although they are, as we have seen (sec. 1323), rather the colleagues than the servants of the President, his authority is yet always in the last resort final and decisive: the secretaries have had very few powers conferred upon them by Congress in the exercise of which they are not more or less subject to presidential oversight and control. The President is in a very real sense head of the Executive. In France and England, on the contrary, the nominal head of the Executive is not its real head. Not the President or the sovereign but the Prime Minister speaks the decisive word in administration and in the initiation of policy, — and the Prime Minister only so far as he can carry his colleagues with him. The headship of the President and the sovereign is in large part formal merely, being real only in proportion to the influence given them by their interior position as regards affairs. The

influence of the Prime Minister is the vital integrating force. Perhaps it is safe to say that only in Germany, among constitutional states, have we an example of a really sovereign guiding will in administration. The Emperor's own will or that of the vice-regent Chancellor is the real centre and source of policy, and the heads of department are ministers of that will. And there is under such a system an energy and coherence of administrative action such as no other system can secure. The grave objection to it is the absorption of so much vitality by the head of the state that its outlying parts, its great constituent members, the people, are apt to be drained of their political life.

1383. **Relations of the Administration as a Whole to the Ministers as a Body.** — Scarcely less important from an administrative point of view than the relations of the ministers to the head of the Executive is the relation of the administration as a whole, both central and local, to the ministers as a body. We have seen (secs. 1185, 1206, 1207) that in the commonwealths of our own Union there is in this regard practically no administrative integration; that the central officers of administration do not as a rule constitute a controlling but only a superior sort of clerical body. In our federal organization we have the President as supreme chief, but the cabinet as a body does not usually exercise any concerted control over administration taken as a whole. Its conferences as a body are confined for the most part to political questions: administrative questions are decided separately, by each department for itself, the only real central authority in administrative matters being the President's opinion, not the counsel of his ministers. As regards points of administrative policy each department is a law unto itself. In England we find a slightly greater degree of administrative control exercised by the Cabinet as a body. A "Treasury minute," for instance, is required for any redivision of business among the departments, and such redivisions are presumably matters of agreement in Cabinet council. But even in England the administrative control of the Cabinet is rather the result of the political responsibility of the Cabinet than of any conscious effort to integrate administration by the constitution of a body which shall habitually regulate, by semi-judicial processes, the main features and when

necessary even the details of executive management. In France and Prussia, on the contrary, such an effort is made, and is made with effect. In France, besides a Cabinet of ministers whose function is wholly political, there is a *Council* of ministers whose single office is systematic administrative oversight, the harmonizing of methods, the proper distribution of business among the departments, etc. (sec. 422); and above this Council of ministers, again, there is a Council of State, a judicial body whose part it is to accommodate all disputes and adjust all conflicts of jurisdiction between the departments, as well as to act as the supreme administrative tribunal (sec. 468). In Prussia there is a like system: a *Staatsministerium* which to a certain extent combines the duties given in France to the Council of Ministers and to the Council of State, and also a Council of State which is by degrees being elevated to high judicial functions (secs. 576, 577).

1384. **The Administration and the Legislature.** — The relations borne by the Administration, the branch which executes the laws, to the Legislature, the branch which makes the laws, touch the very essence of a system of government. Legislation and administration ought under every well-devised system to go hand in hand. Laws must receive test of their wisdom and feasibility at the hands of administration: administration must take its energy and its policy from legislation. Without legislation administration must limp, and without administration legislation must fail of effect. The vital connection between the two is well illustrated in the matter of money appropriations for the support of administration. Legislators hold, and properly hold, the purse-strings of the nation: only with their consent can taxes be raised or expended. Without the appropriations for which they ask, administrators cannot efficiently perform the tasks imposed upon them: but without full explanation of the necessity for granting the sums asked and of the modes in which it is proposed to spend them legislators cannot in good conscience vote them. A perfect understanding between Executive and Legislature is, therefore, indispensable, and no such understanding can exist in the absence of relations of full confidence and intimacy between the two branches.

1385. The absence of such a coöperative understanding has

led in France to the gravest financial impotency on the part of the government. The Chambers trust almost nothing concerning appropriations to the authoritative suggestion of the ministers. The great Budget Committee (sec. 434) not only examines and revises but also at pleasure annuls or utterly reverses the financial proposals of the ministers: the ministers are for the most part left entirely without power, and therefore entirely without responsibility, in the matter, and appropriations follow the whim of the Chambers rather than the necessities of administration. In England the ministers are allowed to insist upon the appropriation of the sums they ask for, because they are held strictly responsible to Parliament for the policy involved in every financial proposal. The means of raising the money desired Parliament is to a certain extent at liberty to suggest without implying distrust of the ministers; but the amounts the ministers ask for must be voted unless Parliament wishes the ministers to resign. Confidence and responsibility go hand in hand (secs. 868, 871). Under our own system there is practically no commerce between the heads of departments and Congress: the administration sends in estimates, but the Appropriations Committees of the houses decide without ministerial interference the amounts to be granted.

1386. The relations existing between the Executive and the Legislature equally affect every other question of policy, from mere administrative questions, such as the erection of new departments, increases of clerical force, or the redistribution of departmental business, to the gravest questions of commerce, diplomacy, and war. The integration or separation of the Executive and the Legislature may be made an interesting and important criterion of the grade and character, in this day of representative institutions, of political organization in the case of existing governments. Thus in England we have complete leadership in legislation intrusted to the ministers, and to complete leadership is added complete responsibility (secs. 868, 871). In France we have partial leadership (financial matters being excluded) with entire responsibility (sec 427). In Prussia, leadership without responsibility (sec. 533–536); and in Switzerland the same (sec. 670).

Under our own system we have isolation *plus* irresponsibility, — isolation and *therefore* irresponsibility. At this point more widely than at any other our government differs from the other governments of the world. Other Executives lead; our Executive obeys.

XIII.

NATURE AND FORMS OF GOVERNMENT.

1387. **Government rests upon Authority and Force.** — The essential characteristic of all government, whatever its form, is authority. There must in every instance be, on the one hand, governors, and, on the other, those who are governed. And the authority of governors, directly or indirectly, rests in all cases ultimately on *force*. Government, in its last analysis, is organized force. Not necessarily or invariably organized armed force, but the will of a few men, of many men, or of a community prepared by organization to realize its own purposes with reference to the common affairs of the community. Organized, that is, to rule, to dominate. The machinery of government necessary to such an organization consists of instrumentalities fitted to enforce in the conduct of the common affairs of a community the will of the sovereign men: the sovereign minority, or the sovereign majority.

1388. **Not necessarily upon Obvious Force.** — This is not, however, to be interpreted too literally, or too narrowly. The force behind authority must not be looked for as if it were always to be seen or were always being exercised. That there is authority lodged with ruler or magistrate is in every case evident enough; but that that authority rests upon force is not always a fact upon the surface, and is therefore in one sense not always practically significant. In the case of any particular government, the force upon which the authority of its officers rests may never once for generations together take the shape of armed force. Happily there are in our own day many governments, and those among the most prominent, which seldom coerce their subjects, seeming in their tranquil, noiseless operations to run of themselves. They

in a sense operate without the exercise of force. But there is force behind them none the less because it never shows itself. The better governments of our day, — those which rest, not upon the armed strength of governors, but upon the free consent of the governed, — are founded upon constitutions and laws whose source and sanction are the habit of communities. The force which they embody is not the force of a dominant dynasty or of a prevalent minority, but the force of an agreeing majority. And the overwhelming nature of this force is evident in the fact that the minority very seldom challenge its exercise. It is latent just because it is understood to be omnipotent. There is force behind the authority of the elected magistrate, no less than behind that of the usurping despot, a much greater force behind the President of the United States than behind the Czar of Russia. The difference lies in the *display* of coercive power. Physical force is the prop of both, though in the one it is the last, while in the other it is the first, resort.

1389. **The Governing Force in Ancient and in Modern Society.** — These elements of authority and force in government are quite plain to be seen in modern society, even when the constitution of that society is democratic ; but they are not so easily discoverable upon a first view in primitive society. It is common nowadays when referring to the affairs of the most progressive nations to speak of 'government by public opinion,' 'government by the popular voice'; and such phrases possibly describe sufficiently well the full-grown democratic systems. But no one intends such expressions to conceal the fact that the majority, which utters 'public opinion,' does not prevail because the minority are convinced, but because they are outnumbered and have against them not the 'popular voice' only, but the 'popular power' as well, — that it is the potential might rather than the wisdom of the majority which gives it its right to rule. When once majorities have learned to have opinions and to organize themselves for enforcing them, they rule by virtue of power no less than do despots with standing armies or concerting minorities dominating unorganized majorities. But, though it was clearly opinion which ruled in primitive societies, this conception of the might of majorities hardly seems to fit our ideas of primitive systems of

government. What shall we say of them in connection with our present analysis of government? They were neither democracies in which the will of majorities chose the ways of government, nor despotisms, in which the will of an individual controlled, nor oligarchies, in which the purposes of a minority prevailed. Where shall we place the force which lay behind the authority exercised under them? Was the power of the father in the patriarchal family power of arm, mere domineering strength of will? What was the force that sustained the authority of the tribal chieftain or of that chief of chiefs, the king? That authority was not independent of the consent of those over whom it was exercised; and yet it was not formulated by that consent. That consent may be said to have been involuntary, *inbred*. It was born of the habit of the race. It was congenital. It consisted of a custom and tradition, moreover, which bound the chief no less than it bound his subjects. He might no more transgress the unwritten law of the race than might the humblest of his fellow-tribesmen. He was governed scarcely less than they were. All were under bondage to strictly prescribed ways of life. Where, then, lay the force which sanctioned the authority of chief and sub-chief and father in this society? Not in the will of the ruler: that was bound by the prescriptions of custom. Not in the popular choice: over that too the law of custom reigned.

1390. **The Force of the Common Will in Ancient Society.** — The real residence of force in such societies as these can be most easily discovered if we look at them under other circumstances. Nations still under the dominion of customary law have within historical times been conquered by alien conquerors; but in no such case did the will of the conqueror have free scope in regulating the affairs of the conquered. Seldom did it have any scope at all. The alien throne was maintained by force of arms, and taxes were mercilessly wrung from the subject populations; but never did the despot venture to change the customs of the conquered land. Its native laws he no more dared to touch than would a prince of the dynasty which he had displaced. He dared not play with the forces latent in the prejudices, the fanaticism of his subjects. He knew that those forces were volcanic, and that no prop of armed men could save his throne from overthrow and destruction

should they once break forth. He really had no authority to govern, but only a power to despoil, — for the idea of government is inseparable from the conception of *legal regulation*. If, therefore, in the light of such cases, we conceive the throne of such a society as occupied by some native prince whose authority rested upon the laws of his country, it is plain to see that the real force upon which authority rests under a government so constituted is after all the force of public opinion, in a sense hardly less vividly real than if we spoke of a modern democracy. The law inheres in the common will: and it is that law upon which the authority of the prince is founded. He rules according to the common will: for that will is, that immemorial custom be inviolably observed. The force latent in that common will both backs and limits his authority.

1391. **Public Opinion, Ancient and Modern.** — The fact that the public opinion of such societies made no deliberate choice of laws or constitutions need not confuse the analogy between that public opinion and our own. Our own approval of the government under which we live, though doubtless conscious and in a way voluntary, is largely hereditary, — is largely an inbred and inculcated approbation. There is a large amount of mere *drift* in it. Conformity to what is established is much the easiest habit in opinion. Our constructive choice even in our own governments, under which there is no divine canon against change, is limited to *modifications*. The generation that saw our federal system established may have imagined themselves out-of-hand creators, originators of government; but we of this generation have taken what was given us, and are not controlled by laws altogether of our own making. Our constitutional life was made for us long ago. We are like primitive men in the public opinion which preserves; though unlike them in the public opinion which alters our institutions. Their stationary common thought contained the generic forces of government no less than does our own progressive public thought.

1392. **The True Nature of Government.** — What, then, in the last analysis, is the nature of government? If it rests upon authority and force, but upon authority which depends upon the acquiescence of the general will and upon force suppressed,

latent, withheld except under extraordinary circumstances, what principle lies behind these phenomena, at the heart of government? The answer is hidden in the nature of Society itself. Society is in no sense artificial; it is as truly natural and organic as the individual man himself. As Aristotle said, man is by nature a social animal; his social function is as normal with him as is his individual function. Since the family was formed, he has not been without politics, without political association. Society, therefore, is compounded of the common habit and is an evolution of experience, an interlaced growth of tenacious relationships, a compact, living, organic whole, structural, not mechanical.

1393. **Society an Organism, Government an Organ.** — Government is merely the executive organ of society, the organ through which its habit acts, through which its will becomes operative, through which it adapts itself to its environment and works out for itself a more effective life. There is clear reason, therefore, why the disciplinary action of society upon the individual is exceptional; clear reason also why the power of the despot must recognize certain ultimate limits and bounds; and clear reason why sudden or violent changes of government lead to equally violent and often fatal reactions and revolutions. It is only the exceptional individual who is not held fast to the common habit of social duty and comity. The despot's power, like the potter's, is limited by the characteristics of the materials in which he works, of the society which he manipulates; and change which roughly breaks with the common thought will lack the sympathy of that thought, will provoke its opposition, and will inevitably be crushed by that opposition. Society, like other organisms, can be changed only by evolution, and revolution is the antipode of evolution. The public order is preserved because order inheres in the character of society.

1394. **The Forms of Government: their Significance.** — The forms of government do not affect the essence of government: the bayonets of the tyrant, the quick concert and superior force of an organized minority, the latent force of a self-governed majority, — all these depend upon the organic character and development of the community. "The obedience of the subject

to the sovereign has its root not in contract but in force, — the force of the sovereign to punish disobedience";[1] but that force must be backed by the general habit (secs. 1435–1442). The forms of government are, nevertheless, in every way most important to be observed, for the very reason that they express the character of government, and indicate its history. They exhibit the stages of political development, and make clear the necessary constituents and ordinary purposes of government, historically considered. They illustrate, too, the sanctions upon which it rests.

1395. **Aristotle's Analysis of the Forms of Government.** — It has been common for writers on politics in speaking of the several forms of government to rewrite Aristotle, and it is not easy to depart from the practice. For, although Aristotle's enumeration was not quite exhaustive, and although his descriptions will not quite fit modern types of government, his enumeration still serves as a most excellent frame on which to hang an exposition of the forms of government, and his descriptions at least furnish points of contrast between ancient and modern governments by observing which we can the more clearly understand the latter.

1396. Aristotle considered Monarchy, Aristocracy, and Democracy (Ochlocracy) the three standard forms of government. The first he defined as the rule of One, the second as the rule of the Few, the third as the rule of the Many.[2] Off against these standard and, so to say, *healthful* forms he set their degenerate shapes. Tyranny he conceived to be the degenerate shape of Monarchy, Oligarchy the degenerate shape of Aristocracy, and Anarchy (or mob-rule) the degenerate shape of Democracy. His observation of the political world about him led him to believe that there was in every case a strong, an almost inevitable, tendency for the pure forms to sink into the degenerate.

1397. **The Cycle of Degeneracy and Revolution.** — He outlined a cycle of degeneracies and revolutions through which, as he conceived, every State of long life was apt to pass. His idea was this. The natural first form of government for every state

[1] John Morley, *Rousseau*, Vol. II., p. 184.

[2] Not of the absolute majority, as we shall see presently when contrasting ancient and modern democracy (secs. 1403, 1406).

would be the rule of a monarch, of the single strong man with sovereign power. This monarch would usually hand on his kingdom to his children. They might confidently be expected to forget those pledges and those views of the public good which had bound and guided him. Their sovereignty would sink into tyranny. At length their tyranny would meet its decisive check at some Runnymede. There would be revolt; and the princely leaders of revolt, taking government into their own hands, would set up an Aristocracy. But aristocracies, though often public-spirited and just in their youth, always decline, in their later years, into a dotage of selfish oligarchy. Oligarchy is even more hateful to civil liberty, is even a graver hindrance to healthful civil life than tyranny. A class bent upon subserving only their own interests can devise injustice in greater variety than can a single despot: and their insolence is always quick to goad the many to hot revolution. To this revolution succeeds Democracy. But Democracy too has its old age of degeneracy, — an old age in which it loses its early respect for law, its first amiability of mutual concession. It breaks out into license and Anarchy, and none but a Cæsar can bring it back to reason and order. The cycle is completed. The throne is set up again, and a new series of deteriorations and revolutions begins.

1398. **Modern Contrasts to the Aristotelian Forms of Government.** — The confirmations of this view furnished by the history of Europe since the time of Aristotle have been striking and numerous enough to render it still oftentimes convenient as a scheme by which to observe the course of political history even in our own days. But it is still more instructive to contrast the later facts of political development with this ancient exposition of the laws of politics. Observe, then, the differences between modern and ancient types of government, and the likelihood that the historian of the future, if not of the present and the immediate past, will have to record more divergencies from the cycle of Aristotle than correspondences with it.

1399. **The Modern Absolute Monarchy.** — Taking the Russian government of to-day as a type of the vast absolute Monarchies which have grown up in Europe since the death of Aristotle, it is evident that the modern monarch, if he be indeed monarch, has

a much deeper and wider reach of power than had the ancient monarch. The monarch of our day is a Legislator; the ancient monarch was not. Antique society may be said hardly to have known what legislation was. Custom was for it the law of public as well as of private life: and custom could not be enacted. At any rate ancient monarchies were not legislative. The despot issued edicts, — imperative commands covering particular cases or affecting particular individuals: the Roman emperors were among the first to promulgate 'constitutions,' — general rules of law to be applied universally. The modern despot can do more even than that. He can regulate by his command public affairs not only but private as well, — can even upset local custom and bring all his subjects under uniform legislative control. Nor is he in the least bound to observe his own laws. A word, — and that his own word, — will set them aside: a word will abolish, a word restore, them. He is absolute over his subjects not only, — ancient despots were that, — but over all laws also, — which no ancient despot was.

1400. Of course these statements are meant to be taken with certain important limitations. The modern despot as well as the ancient is bound by the habit of his people. He may change laws, but he may not change life as easily; and the national traditions and national character, the rural and commercial habit of his kingdom, bind him very absolutely. The limitation is not often felt by the monarch, simply because he has himself been bred in the atmosphere of the national life and unconsciously conforms to it (secs. 1435–1442).

1401. **The Modern Monarchy usually 'Limited.'** — But the present government of Russia is abnormal in the Europe of to-day, as abnormal as that of the Turk, — a belated example of those crude forms of politics which the rest of Europe has outgrown. Turning to the other monarchies of to-day, it is at once plain that they present the strongest contrast possible to any absolute monarchy ancient or modern. Almost without exception in Europe, they are 'limited' by the resolutions of a popular parliament. The people have a distinct and often an imperative voice in the conduct of public affairs.

1402. **Is Monarchy now succeeded by Aristocracy?** — And what is to be said of Aristotle's cycle in connection with modern mon-

archies? Does any one suppose it possible that when the despotism of the Czar falls it will be succeeded by an aristocracy; or that when the modified authority of the emperors of Austria and Germany or the king of Italy still further exchanges substance for shadow, a limited class will succeed to the reality of power? Is there any longer any place between Monarchy and Democracy for Aristocracy? Has it not been crowded out?

1403. **English and Ancient Aristocracy contrasted.** — Indeed, since the extension of the franchise in England to the working classes, no example of a real Aristocracy is left in the modern world. At the beginning of this century the government of England, called a 'limited monarchy,' was in reality an Aristocracy. Parliament and the entire administration of the kingdom were in the hands of the classes having wealth or nobility. The members of the House of Lords and the Crown together controlled a majority of the seats in the House of Commons. England was 'represented' by her upper classes almost exclusively. That Aristocracy has been set aside by the Reform Bills of 1832, 1867, and 1885; but it is worth while to look back to it, in order to contrast a modern type of Aristocracy with those ancient aristocracies which were present to the mind of Aristotle. An ancient Aristocracy *constituted* the State; the English aristocracy merely controlled the State. Under the widest citizenship known even to ancient democracy less than half the adult male subjects of the State shared the franchise. The ancient Democracy itself was a government by a minority. The ancient Aristocracy was a government by a still narrower minority; and this narrow minority monopolized office and power not only, but citizenship as well. There were no citizens but they. They were the State. Every one else existed for the State, only they were part of it. In England the case was very different. There the franchise was not confined to the aristocrats; it was only controlled by them. Nor did the aristocrats of England consider themselves the whole of the State. They were quite conscious,— and quite content,— that they had the State virtually in their possession; but they looked upon themselves as holding it in trust for the people of Great Britain. Their legislation was in fact class legislation, oftentimes of a very narrow sort; but they did not

think that it was. They regarded their rule as eminently advantageous to the kingdom; and they unquestionably had, or tried to have, the real interests of the kingdom at heart. They led the State, but did not constitute it.

1404. **Present and Future Prevalence of Democracy.** — If Aristocracy seems about to disappear, Democracy seems about universally to prevail. Ever since the rise of popular education in the last century and its vast development since have assured a thinking weight to the masses of the people everywhere, the advance of democratic opinion and the spread of democratic institutions have been most marked and most significant. They have destroyed almost all pure forms of Monarchy and Aristocracy by introducing into them imperative forces of popular thought and the concrete institutions of popular representation; and they promise to reduce politics to a single form by excluding all other governing forces and institutions but those of a wide suffrage and a democratic representation, — by reducing all forms of government to Democracy.

1405. **Differences of Form between Ancient and Modern Democracies.** — The differences of form to be observed between ancient and modern Democracies are wide and important. Ancient Democracies were 'immediate,' while ours are 'mediate,' that is to say, *representative*. Every citizen of the Athenian State, — to take that as a type, — had a right to appear and vote in proper person in the popular assembly, and in those committees of that assembly which acted as criminal courts; the modern voter votes for a representative who is to sit for him in the popular chamber, — he himself has not even the right of entrance there. This idea of representation, — even the idea of a vote by proxy, — was hardly known to the ancients; but among us it is all-pervading. Even the elected magistrate of an ancient Democracy was not looked upon as a representative of his fellow-citizens. *He was the State*, so far as his functions went, and so long as his term of office lasted. He could break through all law or custom, if he dared. It was only when his term had expired and he was again a private citizen that he could be called to account. There was no impeachment while in office. To our thought all elected to office, — whether Presidents,

ministers, or legislators, — are representatives. The limitations as to the size of the State involved in ancient practices and conceptions is obvious. A State in which all citizens are also legislators must of necessity be small. The modern representative State has no such limitation. It may cover a continent.

1406. **Nature of Democracy, Ancient and Modern.** — The differences of nature to be observed between ancient and modern Democracies are no less wide and important. The ancient Democracy was a class government. As already pointed out, it was only a broader Aristocracy. Its franchise was at widest an exclusive privilege, extending only to a minority. There were slaves under its heel; there were even freedmen who could never hope to enter its citizenship. Class subordination was of the essence of its constitution. From the modern Democratic State, on the other hand, both slavery and class subordination are excluded as inconsistent with its theory, not only, but, more than that, as antagonistic to its very being. Its citizenship is as wide as its native population; its suffrage as wide as its qualified citizenship, — it knows no non-citizen class. And there is still another difference between the Democracy of Aristotle and the Democracy of Tocqueville and Bentham. The citizens of the former lived for the State; the citizen of the latter lives for himself, and the State is for him. The modern Democratic State exists for the sake of the individual; the individual, in Greek conception, lived for the State. The ancient State recognized no personal rights, — all rights were State rights; the modern State recognizes no State rights which are independent of personal rights.

1407. **Growth of the Democratic Idea.** — In making the last statement embrace 'the ancient State' irrespective of kind and 'the modern State,' of whatever form, I have pointed out what may be taken as the cardinal difference between all the ancient forms of government and all the modern. It is a difference which I have already stated in another way. The *democratic idea* has penetrated more or less deeply all the advanced systems of government, and has penetrated them in consequence of that change of thought which has given to the individual an importance quite independent of his membership of a State. I can

here only indicate the historical steps of that change of thought; I cannot go at any length into its causes.

1408. **Subordination of the Individual in the Ancient State.** — We have seen that, in the history of political society, if we have read that history aright, the rights of government, — the magistracies and subordinations of kinship, — antedate what we now call the rights of the individual. A man was at first nobody in himself; he was only the kinsman of somebody else. The father himself, or the chief, commanded only because of priority in kinship: to that all rights of all men were relative. Society was the unit; the individual the fraction. Man existed for society. He was all his life long in tutelage; only society was old enough to take charge of itself. The State was the only Individual.

1409. **Individualism of Christianity and Teutonic Institutions.** — There was no essential change in this idea for centuries. Through all the developments of government down to the time of the rise of the Roman Empire the State continued, in the conception of the western nations at least, to eclipse the individual. Private rights had no standing as against the State. Subsequently many influences combined to break in upon this immemorial conception. Chief among these influences were Christianity and the institutions of the German conquerors of the fifth century. Christianity gave each man a magistracy over himself by insisting upon his personal, individual responsibility to God. For right living, at any rate, each man was to have only his own conscience as a guide. In these deepest matters there must be for the Christian an individuality which no claim of his State upon him could rightfully be suffered to infringe. The German nations brought into the Romanized and partially Christianized world of the fifth century an individuality of another sort, — the idea of allegiance to individuals (sec. 293). Perhaps their idea that each man had a money-value which must be paid by any one who might slay him also contributed to the process of making men units instead of State fractions; but their idea of personal allegiance played the more prominent part in the transformation of society which resulted from their western conquests. The Roman knew no allegiance save allegiance to his State. He swore fealty to his *imperator* as to an embodiment of that State,

not as to an individual. The Teuton, on the other hand, bound himself to his leader by a bond of personal service which the Roman either could not understand or understood only to despise. There were, therefore, individuals in the German State: great chiefs or warriors with a following (*comitatus*) of devoted volunteers ready to die for them in frays not directed by the State, but of their own provoking (secs. 291–293). There was with all German tribes freedom of individual movement and combination within the ranks, — a wide play of individual initiative. When the German settled down as master amongst the Romanized populations of western and southern Europe, his thought was led captive by the conceptions of the Roman law, as all subsequent thought that has known it has been, and his habits were much modified by those of his new subjects; but this strong element of individualism was not destroyed by the contact. It lived to constitute one of the chief features of the Feudal System.

1410. **The Transitional Feudal System.** — The Feudal System was made up of elaborate gradations of personal allegiance. The only State possible under that system was a disintegrate state embracing, not a unified people, but a nation atomized into its individual elements. A king there might be, but he was lord, not of his people, but of his barons. He was himself a baron also, and as such had many a direct subject pledged to serve him; but as king the barons were his only direct subjects; and the barons were heedful of their allegiance to him only when he could make it to their interest to be so, or their peril not to be. They were the kings of the people, who owed direct allegiance to them alone, and to the king only through them. Kingdoms were only greater baronies, baronies lesser kingdoms. One small part of the people served one baron, another part served another baron. As a whole they served no one master. They were not a whole: they were jarring, disconnected segments of a nation. Every man had his own lord, and antagonized every one who had not the same lord as he (secs. 304–313).

1411. **Rise of the Modern State.** — Such a system was fatal to peace and good government, but it cleared the way for the rise of the modern State by utterly destroying the old conceptions. The State of the ancients had been an entity in itself, — an entity

to which the entity of the individual was altogether subordinate. The Feudal State was merely an aggregation of individuals, — a loose bundle of separated series of men knowing few common aims or actions. It not only had no actual unity: it had no thought of unity. National unity came at last, — in France, for instance, by the subjugation of the barons by the king (sec. 323); in England by the joint effort of people and barons against the throne, — but when it came it was the ancient unity with a difference. Men were no longer State fractions; they had become State integers. The State *seemed* less like a natural organism and more like a deliberately organized association. Personal allegiance to kings had everywhere taken the place of native membership of a body politic. Men were now subjects, not citizens.

1412. **Renaissance and Reformation.** — Presently came the thirteenth century with its wonders of personal adventure and individual enterprise in discovery, piracy, and trade. Following hard upon these, the Renaissance woke men to a philosophical study of their surroundings, — and above all of their long-time unquestioned systems of thought. Then arose Luther to reiterate the almost forgotten truths of the individuality of men's consciences, the right of individual judgment. Ere long the new thoughts had penetrated to the masses of the people. Reformers had begun to cast aside their scholastic weapons and come down to the common folk about them, talking their own vulgar tongue and craving their acquiescence in the new doctrines of deliverance from mental and spiritual bondage to Pope or Schoolman. National literatures were born. Thought had broken away from its exclusion in cloisters and universities and had gone out to challenge the people to a use of their own minds. By using their minds, the people gradually put away the childish things of their days of ignorance, and began to claim a part in affairs. Finally, systematized popular education has completed the story. Nations are growing up into manhood. Peoples are becoming old enough to govern themselves.

1413. **The Modern Force of Majorities.** — It is thus no accident, but the outcome of great permanent causes, that there is no more to be found among the civilized races of Europe any satisfactory example of Aristotle's Monarchies and Aristocracies.

The force of modern governments is not now often the force of minorities. It is getting to be more and more the force of majorities. The sanction of every rule not founded upon sheer military despotism is the consent of a thinking people. Military despotisms are now seen to be necessarily ephemeral. Only monarchs who are revered as seeking to serve their subjects are any longer safe upon their thrones. Monarchies exist only by democratic consent.

1414. **New Character of Society.** — And, more than that, the result has been to give to society a new integration. The common habit is now operative again, not in acquiescence and submission merely, but in initiative and progress as well. Society is not the organism it once was, — its members are given freer play, fuller opportunity for origination; but its organic character is again prominent. It is the Whole which has emerged from the disintegration of feudalism and the specialization of absolute monarchy. The Whole, too, has become self-conscious, and by becoming self-directive has set out upon a new course of development.

XIV.

LAW: ITS NATURE AND DEVELOPMENT.

1415. **What is Law?** — Law is the will of the State concerning the civic conduct of those under its authority This will may be more or less formally expressed: it may speak either in custom or in specific enactment. Law may, moreover, be the will either of a primitive family-community such as we see in the earliest periods of history, or of a highly organized, fully self-conscious State such as those of our own day. But for the existence of Law there is needed in all cases alike (1) an organic community capable of having a will of its own, and (2) some clearly recognized body of rules to which that community has, whether by custom or enactment, given life, character, and effectiveness. Law is that portion of the established thought and habit which has gained distinct and formal recognition in the shape of uniform rules backed by the authority and power of Government. The nature of each State, therefore, will be reflected in its law; in its law, too, will appear the functions with which it charges itself; and in its law will it be possible to read its history.

1416. **The Development of Law: its Sources.** — Law thus follows in its development, with slow, sometimes with uneven, but generally with quite certain steps, the evolution of the character, the purposes, and the will of the organized community whose creation it is. The sources whence it springs are as various as the means by which an organic community can shape and express its will as a body politic.

1417. **1. Custom.**[1] — The earliest source of Law is Custom, and custom is formed no one can say definitely how, except that it

[1] I adopt here the classification usual in English writings on Jurisprudence. See, *e.g.*, T. E. Holland, *Jurisprudence*, pp. 48 *et seq.*

is shaped by the coöperative action of the whole community, and not by any kingly or legislative command. It is not formed always in the same way; but it always rests upon the same foundation, upon the general acceptance of a certain course of action as best or most convenient. Whether custom originate in the well-nigh accidental formation of certain habits of action or in a conscious effort on the part of a community to adjust its practices more perfectly to its social and political objects, it becomes, when once it has been formed and accepted by the public authority, a central part of Law. It is difficult, if not impossible, to discover the exact point at which custom passes from the early inchoate state in which it is merely tending to become the express and determinate purpose of a community into the later stage in which it becomes Law; but we can say with assurance that it becomes Law only when it wins the support of a definite authority within the community. It is not Law if men feel free to depart from it.

1418. Under the reign of customary law that state of things actually did exist which modern law still finds it convenient to take for granted: everybody knew what the law was. The Teutonic hundred-moots, for example (sec. 835), the popular assemblies which tried cases under the early polity of our own ancestors, declared the law by the public voice; the people themselves determined what it was and how it should be applied. Custom grew up in the habits of the people; they consciously or unconsciously originated it; to them it was known and by them it was declared.

1419. **2. Religion.** — In the earliest times Custom and Religion were almost indistinguishable; a people's customs bore on every lineament the likeness of its religion. And in later stages of development Religion was still a prolific source of Custom. No primitive community contained any critic who could, even in his secret thought, separate Law from Religion. All rules of life bore for the antique mind the same sanction (sec. 26). There were not in its conception rules moral and rules political: politics, morals, and religion were indistinguishable parts of one great indivisible Law of Conduct. Religion and Politics very soon, it is true, came to have different ministers. In name often, if not always in fact, the priest was distinct from the magistrate.

But throughout a very long development, as we have seen (secs. 46, 53, 120, 250), the magistrate either retained priestly functions or was dominated by rules which the priest declared and of which the priest was the custodian.

1420. Thus the early law of Rome was little more than a body of technical religious rules, a system of means for obtaining individual rights through the proper carrying out of certain religious formulæ (sec. 250); and it marked the beginning of the movement of Roman law towards a broad and equitable system of justice when these rules of procedure were changed from sacerdotal secrets into published law by the publication of the Twelve Tables.

1421. **3. Adjudication.** — One of the busiest and one of the most useful, because watchful, open-minded, and yet conservative, makers of Law under all systems has been the magistrate, the Judge. It is he who in his decisions recognizes and adopts Custom, and so gives it the decisive support of the public power; it is he who shapes written enactments into suitability to individual cases and thus gives them due flexibility and a free development. He is the authoritative voice of the community in giving specific application to its Law: and in doing this he necessarily becomes, because an interpreter, also a maker of Law. Whether deliberately or unconsciously, in expounding and applying he moulds and expands the Law. It is his legitimate function to read Law in the light of his own sober and conscientious judgment as to what is reasonable and just in custom, what practicable, rational, or equitable in legislation.

1422. It is this 'judge-made' law which is to be found, and is therefore so diligently sought for, in the innumerable law Reports cited in our courts. Except under extraordinary circumstances, our courts and those of England will always follow decisions rendered in similar cases by courts of equal jurisdiction in the same state. *A fortiori* do they follow the decisions of the highest courts: by these they are in a sense bound. In the courts of the continent of Europe, on the other hand, decisions are listened to as important expressions of opinion, but not as conclusive authority: are heard much as our own courts or those of England hear the decisions of courts of other states acting under like laws or similar circumstances.

1423. **4. Equity.** — Equity too is judge-made Law; but it is made, not in interpretation of, but in addition to, the laws which

already exist. The most conspicuous types of such Law are the decisions of the Roman Prætor (secs. 258–260) and those of the English Chancellor (sec. 847). These decisions were meant to give relief where existing law afforded none. The Prætor declared, for instance, that he would allow certain less formal processes than had hitherto been permitted to secure rights of property or of contract, of marriage or of control, etc. The English Chancellor, in like manner, as keeper of the king's judicial conscience, supplied remedies in cases for which the Common Law had no adequate processes, and thus relieved suitors of any hardships they might otherwise have suffered from the fixity or excessive formality of the Common Law, and enabled them in many things to obtain their substantial rights without technical difficulty.

1424. After the official decrees of the Prætors had been codified by the Prætor Salvius Iulianus, in the time of the Emperor Hadrian, and still more after they had been embodied in the Code of Justinian, the *Corpus Juris Civilis*, the Prætor's 'equity' became as rigid and determinate as the law which it had been its function to mend and ameliorate. In the same manner, our own state codes, many of which have fused law and equity in the same courts and under common forms of procedure (sec. 1164), have given equity the sanction and consequently the fixity of written law. The English Judicature Act, also, of 1873, merging, as it does, the common-law and equity courts into a single homogeneous system (sec. 920), shows at least that a strong tendency in the same direction exists in England. The adjustments of Equity are less needed now that legislation is constantly active in mending old and creating new law and, when necessary, new procedure.

1425. In the same case with Equity must be classed the numerous so-called 'fictitious actions' which were the invention of the common-law courts and which, by means of imaginary suitors or imaginary transactions, duly recorded as if real, enabled things to be done and rights acquired which would have been impossible under any genuine process of the Common Law.

1426. 5. **Scientific Discussion.** — The carefully formed opinions of learned text-writers have often been accepted as decisive of the Law: more often under the Roman system, however, than under our own (secs. 273–277), though even we have our Cokes, our Blackstones, our Storys, and our Kents, whom our courts hear with the greatest possible respect. It is the proper function of legal science to interpret the law, not piecemeal, as the

courts must, but in such way as to bring all its parts to their full development as doctrine and to their complete adjustment as members of a living system of thought and practice; to give the law system, study the conditions and forms of its genesis and development, and assist courts and legislatures alike in their functions of adaptation and creation.

1427. **6. Legislation.** — That deliberate formulation of new Law to which the name Legislation is given is, for us of the modern time, the most familiar as well as the most prolific source of Law. For us Legislation is the work of representative bodies almost exclusively; but representation is no part of the essential character of the legislative act. Absolute magistrates or kings have in all stages of history been, under one system or another, makers of laws. Whether acting under the sanction of custom or under the more artificial arrangements of highly developed constitutions, father or prætor, king or archon has been a lawgiver. So, too, the assemblies of free men which, alike in Greece and in Rome, constituted the legislative authority were not representative, but primary bodies, like the *Landsgemeinden* of the smaller Swiss cantons.

1428. Representation came in with the Germans; and with the critical development of institutions which the modern world has seen many new phases of Legislation have appeared. Modern law has brought forth those great private corporations whose bye-laws are produced by what may very fitly be called private legislative action. We have, too, on the same model, chartered governments, with legislatures acting under special grants of law-making power (secs. 1024, 1088, 1089, 1092, 1369). Legislation has had and is having a notable development, and is now the almost exclusive means of the formulation of new Law. Custom of the older sort, which gave us the great Common Law, has been in large part superseded by acts of legislation; Religion stands apart, giving law only to the conscience; Adjudication is being more and more restricted by codification; Equity is being merged in the main body of the Law by enactment; Scientific Discussion now does hardly more than collate cases: all means of formulating Law tend to be swallowed up in the one great, deep, and broadening source, Legislation.

1429. **Custom again.** — Custom at last enters again, with a new aspect and a new method. After judges have become the acknowledged and authoritative mouthpieces of Equity and of the interpretative adaptation of customary or enacted Law; after scientific writers have been admitted to power in the systematic elucidation and development of legal principles; even after the major part of all law-making has fallen to the deliberate action of legislatures, given liberal commission to act for the community, Custom still maintains a presiding and even an imperative part in legal history. It is Custom, the silent and unconcerted but none the less prevalent movement, that is, of the common thought and action of a community, which recognizes changes of circumstance which judges would not, without its sanction, feel, or be, at liberty to regard in the application of old enactments, and which legislators have failed to give effect to, by repeal or new enactment. Laws become obsolete because silent but observant and imperative Custom makes evident the deadness of their letter, the inapplicability of their provisions. Custom, too, never ceases to build up practices legal in their character and yet wholly outside formal Law, constructing even, in its action on Congresses and Parliaments, great parts of great constitutions (secs. 871, 1326, 1334, 1335). It constantly maintains the great forces of precedent and opinion which daily work their will, under every form of government, upon both the contents and the administration of Law. Custom is Habit under another name; and Habit in its growth, while it continually adjusts itself to the standard fixed in formal Law, also slowly compels formal Law to conform to its abiding influences. Habit may be said to be the great Law within which laws spring up. Laws can extend but a very little way beyond its limits. They may help it to gradual extensions of its sphere and to slow modifications of its practices, but they cannot force it abruptly or disregard it at all with impunity.

1430. The history of France during the present century affords a noteworthy example of these principles in the field of constitutional law. There we have witnessed this singular and instructive spectacle: a people made democratic in thought by the operation of a speculative political philosophy has adopted constitution after constitution created in the

exact image of that thought. But they had, to begin with, absolutely no democratic habit, — no democratic custom. Gradually that habit has grown, fostered amidst the developments of local self-direction; and the democratic thought has penetrated, wearing the body of practice, its only vehicle to such minds, to the rural populace. Constitutions and custom have thus advanced to meet one another, — constitutions compelled to adopt precedent rather than doctrine as their basis, thought, practical experience rather than the abstract conceptions of philosophy; and habit constrained to receive the suggestions of written law. Now, therefore, in the language of one of her own writers, France has "a constitution the most summary in its text" (leaving most room, that is, for adjustments), "the *most customary in its application*, the most natural outcome of our manners and of the force of circumstances" that she has yet possessed.[1] Institutions too theoretical in their basis to live at first, have nevertheless furnished an *atmosphere* for the French mind and habit: that atmosphere has affected the life of France, — that life the atmosphere. The result some day to be reached will be normal liberty, political vitality and vigor, civil virility.

1431. **Typical Character of Roman and English Law.** — Roman law and English law are peculiar among the legal systems of western Europe for the freedom and individuality of their development. Rome's *jus civile* was, indeed, deeply modified through the influence of the *jus gentium;* it received its philosophy from Greece, and took some color from a hundred sources; and English law, despite the isolation of its island home, received its jury system and many another suggestion from the Continent, and has been much, even if unconsciously, affected in its development by the all-powerful law of Rome. But English and Roman law alike have been much less touched and colored than other systems by outside influences, and have presented to the world what may be taken as a picture of the natural, the normal, untrammelled evolution of law.

1432. **The Order of Legal Development.** — As tested by the history of these systems, the order in which I have placed the Sources of Law is seen to be by no means a fixed order of historical sequence. Custom is, indeed, the earliest fountain of Law, but Religion is a contemporary, an equally prolific, and in some stages of national development an almost identical source; Adjudication comes almost as early as authority itself, and from a

[1] Albert Sorel, *Montesquieu* (Am. trans.), pp. 200, 201.

very antique time goes hand in hand with Equity. Only Legislation, the conscious and deliberate origination of Law, and Scientific Discussion, the reasoned development of its principles, await an advanced stage of growth in the body politic to assert their influence in law-making. In Rome, Custom was hardly separable from Religion, and hid the knowledge of its principles in the breasts of a privileged sacerdotal class; among the English, on the contrary, Custom was declared in folk-moot by the voice of the people, — as possibly it had been among the ancestors of the Romans. In both Rome and England there was added to the influence of the magistrate who adopted and expanded Custom in his judgments the influence of the magistrate (Prætor or Chancellor) who gave to Law the flexible principles and practices of Equity. And in both, Legislation eventually became the only source of Law.

1433. But in Rome Legislation grew up under circumstances entirely Roman, to which English history can afford no parallel. Rome gave a prominence to scientific discussion such as never gladdened the hearts of philosophical lawyers in England. The opinions of distinguished lawyers were given high, almost conclusive, authority in the courts; and when the days of codification came, great texts as well as great statutes and decrees were embodied in the codes of the Empire. The legislation of the popular assemblies, which Englishmen might very easily have recognized, was superseded in the days of the Empire by imperial edicts and imperial codes such as the history of English legislation nowhere shows; and over the formulation of these codes and edicts great jurists presided. The only thing in English legal practice that affords a parallel to the influence of lawyers in Rome is the cumulative authority of judicial opinions. That extraordinary body of precedent, which has become as much a part of the substance of English law as are the statutes of the realm, may be considered the contribution of the legal profession to the law of England.

1434. Savigny would have us seek in the history of every people for a childhood in which law is full of picturesque complexities, a period of form for form's sake and of symbols possessed of mystic significance; a period of adolescence in which a special class of practical jurists make

their appearance and law begins to receive a conscious development; a full young manhood in which legislation plies a busy work of legal expansion and improvement; and an old age amusing itself with external and arbitrary changes in legal systems, and finally killed by the letter of the law.[1]

1435. **The Forces Operative in the Development of Law.** — The forces that create and develop law are thus seen to be the same as those which are operative in national and political development. If that development bring forth monarchical forms of government, if the circumstances amidst which a people's life is cast eradicate habits of local self-rule and establish habits of submission to a single central authority set over a compacted state, that central authority alone will formulate and give voice to Law. If, on the other hand, the national development be so favorably cast that habits of self-reliance and self-rule are fostered and confirmed among the people, along with an active jealousy of any too great concentration of only partially responsible power, Law will more naturally proceed, through one instrumentality or another, from out the nation: *vox legis, vox populi.* But in the one case hardly less than in the other Law will express, not the arbitrary, self-originative will of the man or body of men by whom it is formulated, but such rules as the body of the nation is prepared by reason of its habits and fixed preferences to accept. The function of the framers of Law is a function of interpretation, of formulation rather than of origination: no step that they can take successfully can lie far apart from the lines along which the national life has run. Law is the creation, not of individuals, but of the special needs, the special opportunities, the special perils or misfortunes of communities. No 'law-maker' may force upon a people Law which has not in some sense been suggested to him by the circumstances or opinions of the nation for whom he acts. Rulers, in all states alike, exercise the sovereignty of the community, but cannot exercise any other. The community may supinely acquiesce in the power arrogated to himself by the magistrate, but it can in no case really make him independent of itself.

[1] Bluntschli, *Geschichte der neueren Staatswissenschaft*, ed. 1881, pp. 627, 628.

1436. Here again France furnishes our best illustration. We have a vivid confirmation of the truths stated in such an event as the establishment of the Second Empire. The French people were not duped by Louis Napoleon. The facts were simply these. They were keenly conscious that they were making a failure of the self-government which they were just then attempting; they wanted order and settled rule in place of fear of revolution and the certainty of turbulent politics; and they took the simplest, most straightforward and evident means of getting what they wanted. The laws of Napoleon were in a very real sense their own creation.

1437. **The Power of the Community must be behind Law.** — The law of some particular state may seem to be the command of a minority only of those who compose the state: it may even in form utter only the will of a single despot; but in reality laws which issue from the arbitrary or despotic authority of the few who occupy the central seats of the state can never be given full effect unless in one form or another the power of the community be behind them. Whether it be an active power organized to move and make itself prevalent or a mere inert power lying passive as a vast immovable buttress to the great structure of absolute authority, the power of the community must support law or the law must be without effect. The bayonets of a minority cannot long successfully seek out the persistent disobediences of the majority. The majority must acquiesce or the law must be null.

1438. This principle is strikingly illustrated in the inefficacy of the English repressive laws in Ireland. The consent of the Irish community is not behind them, though the strength of England is; and they fail utterly, as all laws must which lack at least the passive acquiescence of those whom they concern.

1439. There can be no reasonable doubt that the power of Russia's Czar, vast and arbitrary as it seems, derives its strength from the Russian people. It is not the Czar's personal power; it is his power as head of the national church, as semi-sacred representative of the race and its historical development and organization. Its roots run deep into the tenacious, nourishing soil of immemorial habit. The Czar represents a history, not a caprice. Temporary, fleeting despots, like the first Napoleon, lead nations by the ears, playing to their love of glory, to their sense of dignity and honor, to their ardor for achievement and their desire for order.

1440. **Both a Mirror of Conceptions and an Active Force.** — Looked at from an abstract point of view, Law is a body of prin-

ciples, and as such constitutes a mirror of the prevalent conceptions as to ethical standards and social relationships in the communities in which it is accepted. But Law is also an active force, an expression of will. It is not merely a body of opinion; it is also a body of practical rules in operation. It is operative in two ways. It exercises both an ethical and a physical compulsion. It involves (1), an *Ought*, in proportion as it is received as just or expedient. It is a source of conviction and motive in proportion as it is accepted as true. This ethical force is its principal force, its force for the majority. It is daily influential in moving men to do even what they conceive to be contrary to their individual interests. And this even when it is unjust in parts, provided it be deemed sound and just as a whole. (2) For the minority, who do not yield to its moral force or feel its moral compulsions, it involves a *Must*, and speaks harshly of the power of the state. That power is not great enough to venture to say 'You must' to a prevalent majority of any people. In cases of conquest, it is true, like that of the Normans in England, an actual physical compulsion may be operative for long periods together even against a numerical majority, and the law may seem to possess an ethical force only for the minority. But generally the compulsion is confined to the field of public law, in such cases; and there are majorities in affairs which are to be reckoned, not by number, but by capacity.

1441. **Roman Law an Example.** — The law of Rome affords in this respect an admirable example of the normal character of law. It was the fundamental thought of Roman law that it was the will of the Roman people. The political liberty of the Roman consisted in his membership of the state and his consequent participation, either direct or indirect, in the utterance of law. As an individual he was subordinated to the will of the state; but his own will as a free burgess was a part of the state's will: the state spoke his sovereignty. He was an integral part of the organic community, his own power found its realization in the absolute *potestas et majestas populi.* This giant will of the people, speaking through the organs of the state, constituted a very absolute power, by which the individual was completely dominated; but individual rights were recognized in the *equality*

of the law, in its purpose to deal equally with high and low, with strong and weak; and this was the Roman recognition of individual liberty.

1442. **The Power of Habit.** — Legislators, those who exercise the sovereignty of a community, build upon the habit of their so-called 'subjects.' If they be of the same race and sharers of the same history as those whom they rule, their accommodation of their acts to the national habit will be in large part unconscious: for that habit runs in their own veins as well as in the veins of the people. If they be invaders or usurpers, they avoid crossing the prejudices or the long-abiding practices of the nation out of caution or prudence. In any case their activity skims but the surface, avoids the sullen depths of the popular life. They work arbitrary decrees upon individuals, but they are balked of power to turn about the life of the mass: that they can effect only by slow and insidious measures which almost insensibly deflect the habits of the people into channels which lead away from old into new and different methods and purposes. The habit of the nation is the material on which the legislator works; and its qualities constitute the limitations of his power. It is stubborn material, and dangerous. If he venture to despise it, it forces him to regard and humor it; if he would put it to unaccustomed uses, it balks him; if he seek to force it, it will explode in his hands and destroy him. The sovereignty is not his, but only the leadership.

1443. **Law's Utterance of National Character.** — There is no universal law, but for each nation a law of its own, which bears evident marks of having been developed along with the national character, which mirrors the special life of the particular people whose political and social judgments it embodies (sec. 1431). The despot may be grossly arbitrary; he may violate every principle of right in his application of the law to individuals; he may even suspend all justice in individual cases; but the law, the principles which he violates or follows at pleasure, he takes from the people whom he governs, extracts from their habit and history. What he changes is the application merely, not the principles, of justice; and he changes that application only with reference to a comparatively small number of individuals whom

he specially picks out for his enmity or displeasure. He cannot violently turn about the normal processes of the national law.

1444. **Germanic Law.** — We have in Germanic law an example of the influence of national character upon legal systems as conspicuous as that afforded by Roman law itself, and the example is all the more instructive when put alongside of the Roman because of the sharpness of the contrasts between Roman and Germanic legal conceptions. Although so like the Romans in practical political sagacity and common-sense legal capacity, the Germans had very different conceptions as to the basis and nature of law. Their law spoke no such exaltation of the public power, and consequently no such intense realization of organic unity. The individual German was, so to say, given play outside the law; his rights were not relative, but absolute, self-centered. It was the object of the public polity rather to give effect to individual worth and liberty than to build together a compact, dominant community. German law, therefore, took no thought for systematic equality, but did take careful thought to leave room for the fullest possible assertion of that individuality which must inevitably issue in inequality. It was a flexible framework for the play of individual forces. It lacked the organic energy, the united, triumphant strength of the Roman system; but it contained untold treasures of variety and of individual achievement. It, no less than Roman law, rested broadly upon national character; and it was to supply in general European history what the Roman system could not contribute.

1445. **Sovereignty: who gives Law?** — If, then, law be a product of national character, if the power of the community must be behind it to give it efficacy, and the habit of the community in it to give it reality, where is the seat of sovereignty? Whereabouts and in whom does sovereignty reside, and what is Sovereignty? These, manifestly, are questions of great scope and complexity, and yet questions central to a right understanding of the nature and genesis of law. It will be best to approach our answers to them by way of illustrations.

1446. In England, sovereignty is said to rest with the legislative power: with Parliament acting with the approval of the Crown, or, not to discard an honored legal fiction, with the Crown

acting with the assent of Parliament. Whatever an Act of Parliament prescribes is law, even though it contravene every principle, constitutional or only of private right, recognized before the passage of the Act as inviolable. Such is the theory. The well-known fact is, that Parliament dare do nothing that will even seem to contravene principles held to be sacred in the sphere either of constitutional privilege or private right. Should Parliament violate such principles, their action would be repudiated by the nation, their will, failing to become indeed law, would pass immediately into the limbo of things repealed; Parliament itself would be purged of its offending members. Parliament is master, can utter valid commands, only so far as it interprets, or at least does not cross, the wishes of the people. Whether or not it be possible to say with the approval of those who insist upon maintaining the rules of a strict abstract logic that the sovereignty of Parliament is limited *de jure*, that is, in law, it is manifestly the main significant truth of the case that parliamentary sovereignty is most imperatively limited *de facto*, in fact. Its actual power is not a whit broader for having a free field *in law*, so long as the field in which it really moves is fenced high about by firm facts.

1447. Again, it is said, apparently with a quite close regard for the facts, that in Russia sovereignty is lodged with the Czar, the supreme master "of all the Russias." That his will is law Siberia attests and Nihilism recognizes. But is there no *de facto* limitation to his supremacy? How far could he go in the direction of institutional construction? How far could he succeed in giving Russia at once and out of hand the institutions, and Russians the liberties, of the United States and its people? How far would such a gift be law? Only so far as life answered to its word of command. Only so far as Russian habit, schooled by centuries of obedience to a bureaucracy, could and would respond to its invitation. Only so far, in a word, as the new institutions were accepted. The measure of the Czar's sovereignty is the habit of his people; and not their habit only, but their humor also, and the humor of his officials. His concessions to the restless spirit of his army, to the prejudices of his court, and to the temper of the mass of his subjects, his means of keeping this side

assassination or revolution, nicely mark the boundaries of his sovereignty.

1448. Sovereignty, therefore, as ideally conceived in legal theory, nowhere actually exists. The sovereignty which does exist is something much more vital, — though, like most living things, much less easily conceived. It is the will of an organized independent community, whether that will speak in acquiescence merely, or in active creation of the forces and conditions of politics. The kings or parliaments who serve as its vehicles utter it, but they do not possess it. Sovereignty resides in the community; but its organs, whether those organs be supreme magistrates, busy legislatures, or subtile privileged classes, are as various as the conditions of historical growth.

1449. **Certain Legal Conceptions Universal.** — The correspondence of law with national character, its basis in national habit, does not deprive it of all universal characteristics. Many common features it does wear among all civilized peoples. As the Romans found it possible to put together, from the diversified systems of law existing among the subject peoples of the Mediterranean basin, a certain number of general maxims of justice out of which to construct the foundations of their *jus gentium*, so may jurists to-day discover in all systems of law alike certain common moral judgments, a certain evidence of unity of thought regarding the greater principles of equity. There is a common legal conscience in mankind.

1450. Thus, for example, the sacredness of human life; among all Aryan nations at least, the sanctity of the nearer family relationships; in all systems at all developed, the plainer principles of 'mine' and 'thine'; the obligation of promises; many obvious duties of man to man suggested by the universal moral consciousness of the race, receive recognition under all systems alike. Sometimes resemblances between systems the most widely separated in time and space run even into ceremonial details, such as the emblematic transfer of property, and into many items of personal right and obligation.

1451. **Law and Ethics.** — It by no means follows, however, that because law thus embodies the moral judgments of the race on many points of personal relation and individual conduct, it is to be considered a sort of positive, concrete Ethics, — Ethics

crystallized into definite commands towards which the branch of culture which we call 'Ethics' stands related as theory to practice. Ethics concerns the whole walk and conversation of the individual; it touches the rectitude of each man's life, the truth of his dealings with his own conscience, the whole substance of character and conduct, righteousness both of act and of mental habit. Law, on the other hand, concerns only man's life in society. It not only confines itself to controlling the outward acts of men; it limits itself to those particular acts of man to man which can be regulated by the public authority, which it has proved practicable to regulate in accordance with uniform rules applicable to all alike and in an equal degree. It does not essay to punish untruthfulness as such, it only annuls contracts obtained by fraudulent misrepresentation and makes good such pecuniary damage as the deceit may have entailed. It does not censure ingratitude or any of the subtler forms of faithlessness, it only denounces its penalties against open and tangible acts of dishonesty. It does not assume to be the guardian of men's characters, it only stands with a whip for those who give overt proof of bad character in their dealings with their fellow-men. Its limitations are thus limitations both of kind and of degree. It addresses itself to the regulation of outward conduct only: that is its limitation of kind; and it regulates outward conduct only so far as workable and uniform rules can be found for its regulation: that is its limitation of degree.

1452. **Mala Prohibita.** — Law thus plays the rôle neither of conscience nor of Providence. More than this, it follows standards of policy only, not absolute standards of right and wrong. Many things that are wrong, even within the sphere of social conduct, it does not prohibit; many things not wrong in themselves it does prohibit. It thus creates, as it were, a new class of wrongs, relative to itself alone: *mala prohibita*, things wrong because forbidden. In keeping the commands of the state regarding things fairly to be called morally indifferent in themselves men are guided by their *legal* conscience. Society rests upon obedience to the laws: laws determine the rules of social convenience as well as of social right and wrong; and it is as necessary for the perfecting of social relationships that the rules

of convenience be obeyed as it is that obedience be rendered to those which touch more vital matters of conduct.

1453. Thus it cannot be said to be inherently wrong for a man to marry his deceased wife's sister; but if the laws, seeking what may be esteemed to be a purer order of family relationships, forbid such a marriage, it becomes *malum prohibitum:* it is wrong because illegal.

1454. It would certainly not be wrong for a trustee to buy the trust estate under his control if he did so in good faith and on terms manifestly advantageous to the persons in whose interest he held it; but it is contrary to wise public policy that such purchases should be allowed, because a trustee would have too many opportunities for unfair dealing in such transactions. The law will under no circumstances hold the sale of a trust estate to the trustee valid. Such purchases, however good the faith in which they are made, are *mala prohibita.*

1455. Or take, as another example, police regulations whose only object is to serve the convenience of society in crowded cities. A street parade, with bands and banners and men in uniform is quite harmless and is immensely pleasing to those who love the glitter of epaulettes and brass buttons and the blare of trumpets; but police regulations must see to it that city streets are kept clear for the ordinary daily movements of the busy city population, and to parade without license is *malum prohibitum.*

1456. In all civilized states law has long since abandoned attempts to regulate conscience or opinion; it would find it, too, both fruitless and unwise to essay any regulation of conduct, however reprehensible in itself, which did not issue in definite and tangible acts of injury to others. But it does seek to command the outward conduct of men in their palpable dealings with each other in society. Law is the mirror of active, organic political life. It may be and is instructed by the ethical judgments of the community, but its own province is not distinctively ethical; it may regard religious principle, but it is not a code of religion. Ethics has been called the science of the well-being of man, law the science of his right civil conduct. Ethics concerns the development of character; religion, the development of man's relation with God; law, the development of men's relations to each other in society. Ethics, says Mr. Sidgwick, "is connected with politics so far as the well-being of any individual man is bound up with the well-being of his society."

1457. **International Law.** — The province of International Law may be described as a province half-way between the province of morals and the province of positive law. It is law without a forceful sanction. There is no earthly power of which all nations are subjects; there is no power, therefore, to enforce obedience to rules of conduct as between nation and nation. International Law is, moreover, a law which rests upon those uncodified, unenacted principles of right action, of justice, and of consideration which have so universally obtained the assent of men's consciences, which have so universal an acceptance in the moral judgments of men everywhere, that they have been styled Laws of Nature (secs. 270–271), but which have a nearer kinship to ethical maxims than to positive law. "The law of nations," says Bluntschli, "is that recognized universal Law of Nature which binds different states together in a humane jural society, and which also secures to the members of different states a common protection of law for their general human and international rights."[1] Its only formal and definite foundations, aside from the conclusions of those writers who, like Grotius and Vattel, have given to it distinct statements of what they conceived to be the leading, the almost self-evident principles of the Law of Nature, are to be found in the treaties by which states, acting in pairs or in groups, have agreed to be bound in their relations with each other, and in such principles of international action as have found their way into the statutes or the established judicial precedents of enlightened individual states. More and more, international conventions have come to recognize in their treaties certain elements of right, of equity, and of comity as settled, as always to be accepted in transactions between nations. The very jealousies of European nations have contributed to swell the body of accepted treaty principles. As the practice of concerted action by the states of the continent of Europe concerning all questions of large interest, the practice of holding great Congresses like those of Vienna in 1815, of Paris in 1856, and of Berlin in 1878, has grown into the features of a custom, so has the body of principles which are practically of universal recognition increased. International Law, says Dr. Bulmerincq, "is the totality of legal

[1] *Das Völkerrecht*, sec. I.

rules and institutions which have developed themselves touching the relations of states to one another."[1]

1458. International Law is, therefore, not law at all in the strictest sense of the term. It is not, as a whole, the will of any state: there is no authority set above the nations whose command it is. In one aspect, the aspect of Bluntschli's definition, it is simply the body of rules, developed out of the common moral judgments of the race, which *ought* to govern nations in their dealings with each other. Looked at from another, from Dr. Bulmerincq's, point of view, it is nothing more than a generalized statement of the rules which nations have actually recognized in their treaties with one another, made from time to time, and which by reason of such precedents are coming more and more into matter-of-course acceptance.

1459. These rules concern the conduct of war, diplomatic intercourse, the rights of citizens of one country living under the dominion of another, jurisdiction at sea, etc. Extradition principles are settled almost always by specific agreement between country and country, as are also commercial arrangements, fishing rights, and all similar matters not of universal bearing. But even in such matters example added to example is turning nations in the direction of uniform principles; such, for instance, as that political offences shall not be included among extraditable crimes, unless they involve ordinary crimes of a very heinous nature, such as murder.

1460. **Laws of Nature and Laws of the State.** — The analogy between political laws, the laws which speak the will of the state, and natural laws, the laws which express the orderly succession of events in nature, has often been dwelt upon, and is not without instructive significance. In the one set of laws as in the other, there is, it would seem, a uniform prescription as to the operation of the forces that make for life. The analogy is most instructive, however, where it fails: it is more instructive, that is, to note the contrasts between the laws of nature and laws of the state than to note such likeness as exists between them. The contrasts rather than the resemblances serve to make evident the real nature of political regulation. "Whenever we have made

[1] *Das Völkerrecht* (in Marquardsen's *Handbuch*, Vol. I.), sec. I. of the monograph.

out by careful and repeated observation," says Professor Huxley, "that something is always the cause of a certain effect, or that certain events always take place in the same order, we speak of the truth thus discovered as a law of nature. Thus it is a law of nature that anything heavy falls to the ground if it is unsupported. . . . But the laws of nature are not the causes of the order of nature, but only our way of stating as much as we have made out of that order. Stones do not fall to the ground in consequence of the law just stated, as people sometimes carelessly say; but the law is a way of asserting that which invariably happens when heavy bodies at the surface of the earth, stones among the rest, are free to move." Whatever analogies may exist between such generalized statements of physical fact and the rules in accordance with which men are constrained to act in organized civil society it may be profitable for the curious carefully to inquire into. What it is most profitable for the student of politics to observe is the wide difference between the two, which Professor Huxley very admirably states as follows: "Human law consists of commands addressed to voluntary agents, which they may obey or disobey; and the law is not rendered null and void by being broken. Natural laws, on the other hand, are not commands, but assertions respecting the invariable order of nature; and they remain law only so long as they can be shown to express that order. To speak of the violation or suspension of a law of nature is an absurdity. All that the phrase can really mean is that, under certain circumstances, the assertion contained in the law is not true; and the just conclusion is, not that the order of nature is interrupted, but that we have made a mistake in stating that order. A true natural law is a universal rule, and, as such, admits of no exception."[1] In brief, human choice enters into the law of the state, whereas from natural law that choice is altogether excluded: it is dominated by fixed necessity. Human choice, indeed, enters every part of political law to modify it. It is the element of change; and it has given to the growth of law a variety, a variability, and an irregularity which no other power could have imparted.

[1] These passages are taken from Professor Huxley's *Science Primer, Introductory.*

1461. **Limitations of Political Law.** — We have thus laid bare to our view some of the most instructive characteristics of political law. The laws of nature formulate effects invariably produced by forces of course adequate to produce them; but behind political laws there is not always a force adequate to produce the effects which they are designed to produce. The force, the *sanction*, as jurists say, which lies behind the laws of the state is the organized armed power of the community: compulsion raises its arm against the man who refuses to obey (secs. 1387, 1440). But the public power may sleep, may be inattentive to breaches of law, may suffer itself to be bribed, may be outwitted or thwarted: laws are not always 'enforced.' This element of weakness it is which opens up to us one aspect at least of the nature of Law. Law is no more efficient than the state whose will it utters. The law of Turkey shares all the imperfections of the Turkish power; the laws of England bespeak in their enforcement the efficacy of English government. Good laws are of no avail under a bad government; a weak, decadent state may speak the highest purposes in its statutes and yet do the worst things in its actual administration. Commonly, however, law embodies the real purposes of the state, and its enforcement is a matter of administrative capacity or of concerted power simply.

1462. **Public Law.** — The two great divisions under which law may best be studied are these: (1) *Public Law*, (2) *Private Law*. Public law is that which immediately concerns the existence, the structure, the functions, and the methods of the state. Taken in its full scope, it includes not only what we familiarly know as constitutional law, but also what is known as administrative law, as well as all civil procedure in the courts and all criminal law. In brief, it is that portion of law which determines a state's own character and its relations to its citizens.

1463. **Private Law.** — Private law, on the other hand, is that portion of positive law which secures to the citizen his rights as against the other citizens of the state. It seeks to effect justice between individual and individual; its sphere is the sphere of individual right and duty.

1464. It is to the Romans that we are indebted for a first partial recognition of this important division in the province of Law, though later

times have given a different basis to this distinction. I say 'indebted' because the distinction between public and private law has the most immediate connections with individual liberty. Without it, we have the state of affairs that existed in Greece, where there was no sphere which was not the state's (secs. 1482–1484); and where the sphere of the state's relations to the individual was as wide as the sphere of the law itself. Individual liberty can exist only where it is recognized that there are rights which the state does not create, but only secures.

1465. **Jurisprudence.** — Jurisprudence is a term of much latitude, but when used strictly must be taken to mean the Science of Law. The science of law is complete only when it has laid bare both the nature and the genesis of law: the nature of law must be obscure until its genesis and the genesis of the conceptions upon which it is based have been explored; and that genesis is a matter, not of logical analysis, but of history. Many writers upon jurisprudence, therefore, have insisted upon the historical method of study as the only proper method. They have sought in the history of society and of institutions to discover the birth and trace the development of jural conceptions, the growths of practice which have expanded into the law of property or of torts, the influences which have contributed to the orderly regulation of man's conduct in society.

1466. In the hands of another school of writers, however, jurisprudence has been narrowed to the dimensions of a science of law in its modern aspects only. They seek to discover, by an analysis of law in its present full development, the rights which habitually receive legal recognition and the methods by which states secure to their citizens their rights, and enforce upon them their duties, by positive rules backed by the abundant sanction of the public power. In their view, not only is the history of law not jurisprudence, but, except to a very limited extent, it is not even the material of jurisprudence. Its material is law as it at present exists. The history of that law is only a convenient light in which the real content and purpose of existing law may be made plainer to the analyst. The conclusions of these writers are subject to an evident limitation, therefore. Their analysis of law, being based upon existing legal systems alone and taking the fully developed law for granted, can be applied to law in the

earlier stages of society only by careful modification, only by a more or less subtle and ingenious accommodation of the meaning of its terms.

1467. Historical jurisprudence alone, — a science of law, that is, constructed by means of the historical analysis of law and always squaring its conclusions with the history of society, can serve the objects of the student of politics. The processes of analytical jurisprudence, however, having been conducted by minds of the greatest subtlety and acuteness, serve a very useful purpose in supplying a logical structure of thought touching full-grown systems of law.

1468. **The Analytical Account of Law.** — In the thought of the analytical school every law is a command, "an order issued by a superior to an inferior." "Every positive law is 'set by a sovereign person, or sovereign body of persons, to a member or members of the independent political society wherein that person or body of persons is sovereign or superior.'" In its terms, manifestly, such an analysis applies only to times when the will of the state is always spoken by a definite authority; not with the voice of custom, which proceeds no one knows whence; not with the voice of religion, which speaks to the conscience as well as to the outward life, and whose sanctions are derived from the unseen power of a supernatural being; nor yet with the voice of scientific discussion, whose authors have no authority except that of clear reason; but with the distinct accents of command, with the voice of the judge and the legislator.

1469. **The Analytical Account of Sovereignty.** — The analytical account of sovereignty is equally clear-cut and positive. Laws, "being commands, emanate from a determinate source," from a sovereign authority; and analytical jurisprudence is very strict and formal in its definition of sovereignty. A sovereign "is a determinate person, or body of persons, to whom the bulk of the members of an organized community are in the habit of rendering obedience and who are themselves not in the habit of rendering obedience to any human superior." It follows, of course, that no organic community which is not independent can have a law of its own. The law of the more fully developed English colonies, for example, though it is made by the enactment of their own parliaments, is not law by virtue of such enactment, because those parliaments are in the habit of being obedient to the authorities in London and are not them-

selves sovereign. The sovereignty which lies back of all law in the colonies is said to be the sovereignty of the parliament of England.

1470. It would seem to follow that our own federal authorities are sovereign. They are a determinate body of persons to whom the bulk of the nation is habitually obedient and who are themselves obedient to no human superior. But then what of the authority of the states in that great sphere of action which is altogether and beyond dispute their own (sec. 1091), which the federal authorities do not and cannot enter, within which their own people are habitually obedient to them, and in which they are not subject to any earthly superior? It has been the habit of all our greater writers and statesmen to say that with us sovereignty is divided. But the abstract sovereignty of which the legal analyst speaks is held to be indivisible: it must be whole. Analysis, therefore, is driven to say that with us sovereignty rests in its entirety with that not very determinate body of persons, the people of the United States, the *powers* of sovereignty resting with the state and federal authorities by delegation from the people.

1471. The difficulty of applying the analytical account of sovereignty to our own law is in part avoided if law be defined as "the command of an authorized public organ, acting within the sphere of its competence. What organs are authorized, and what is the sphere of their competence, is of course determined by the organic law of the state; and *this* law is the direct command of the sovereign."[1] The only difficulty left by this solution is that of making room in our system for both a sovereign people of the single state and a sovereign people of the Union.

1472. **Summary.** — Spoken first in the slow and general voice of custom, Law speaks at last in the clear, the multifarious, the active tongues of legislation. It grows with the growth of the community. It cannot outrun the conscience of the community and be real, it cannot outlast its judgments and retain its force. It mirrors social advance. If it anticipate the development of the public thought, it must wait until the common judgment and conscience grow up to its standards before it can have life; if it lag behind the common judgment and conscience, it must become obsolete, and will come to be more honored in the breach than in the observance.

[1] This definition I have taken the liberty of extracting from some very valuable notes on this chapter kindly furnished me by Professor Monroe Smith, who upon this subject speaks authoritatively.

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XV.

THE FUNCTIONS OF GOVERNMENT.

1473. **What are the Functions of Government?** — The question has its own difficulties and complexities: it cannot be answered out of hand and by the list, as the physiologist might answer the question, What are the functions of the heart? In its *nature* government is one, but in its *life* it is many: there are governments *and* governments. When asked, therefore, What are the functions of government? we must ask in return, Of what government? Different states have different conceptions of their duty, and so undertake different things. They have had their own peculiar origins, their own characteristic histories; circumstance has moulded them; necessity, interest, or caprice has variously guided them. Some have lingered near those primitive institutions which all once knew and upheld together; others have quite forgotten that man ever had a political childhood and are now old in complex practices of national self-government.

1474. **The Nature of the Question.** — It is important to notice at the outset that this is in one aspect obviously a simple *question of fact;* and yet there is another phase of it, in which it becomes as evidently a question of opinion. The distinction is important because over and over again the question of fact has been confounded with that very widely different question, *What ought the functions of government to be?* The two questions should be kept entirely separate in treatment. Under no circumstances may we instructively or safely begin with the question of opinion: the answer to the question of fact is the indispensable foundation of all sound reasoning concerning government, which is at all points based upon experience rather than upon theory. The facts of government mirror the principles of government in operation.

What government does must arise from what government is: and what government is must determine what government ought to do.

1475. **Classification.** — It will contribute to clearness of thought to observe the functions of government in two groups, I. *The Constituent* Functions, II. *The Ministrant.* Under the *Constituent* I would place that usual category of governmental function, the protection of life, liberty, and property, together with all other functions that are necessary to the civic organization of society, — functions which are *not optional* with governments, even in the eyes of strictest *laissez faire*, — which are indeed the very bonds of society. Under the *Ministrant* I would range those other functions (such as education, posts and telegraphs, and the care, say, of forests) which are undertaken, not by way of *governing*, but by way of advancing the general interests of society, — functions which *are* optional, being necessary only according to standards of convenience or expediency, and not according to standards of existence; functions which assist without constituting social organization.

1476. Of course this classification is based primarily upon objective and practical distinctions and cannot claim philosophic completeness. There may be room for question, too, as to whether some of the functions which I class as Ministrant might not quite as properly have been considered Constituent; but I must here simply act upon my own conclusions without rearguing them, acknowledging by the way that the line of demarcation is not always perfectly clear.

1477. "The admitted functions of government," said Mr. Mill, "embrace a much wider field than can easily be included within the ring-fence of any restrictive definition, and it is hardly possible to find any ground of justification common to them all, except the comprehensive one of general expediency."

1478. **I. The Constituent Functions:**

(1) The keeping of order and providing for the protection of persons and property from violence and robbery.

(2) The fixing of the legal relations between man and wife and between parents and children.

(3) The regulation of the holding, transmission, and interchange of property, and the determination of its liabilities for debt or for crime.

(4) The determination of contract rights between individuals.
(5) The definition and punishment of crime.
(6) The administration of justice in civil causes.
(7) The determination of the political duties, privileges, and relations of citizens.
(8) Dealings of the state with foreign powers: the preservation of the state from external danger or encroachment and the advancement of its international interests.

These will all be recognized as functions which are obnoxious not even to the principles of Mr. Spencer,[1] and which persist under every form of government.

1479. **II. The Ministrant Functions.** — It is hardly possible to give a complete list of those functions which I have called Ministrant, so various are they under different systems of government. The following partial list will suffice, however, for the purposes of the present discussion:

(1) The regulation of trade and industry. Under this head I would include the coinage of money and the establishment of standard weights and measures, laws against forestalling and engrossing, the licensing of trades, etc., as well as the great matters of tariffs, navigation laws, and the like.
(2) The regulation of labor.
(3) The maintenance of thoroughfares, — including state management of railways and that great group of undertakings which we embrace within the comprehensive term 'Internal Improvements.'
(4) The maintenance of postal and telegraph systems, which is very similar in principle to (3).
(5) The manufacture and distribution of gas, the maintenance of water-works, etc.
(6) Sanitation, including the regulation of trades for sanitary purposes.
(7) Education.
(8) Care of the poor and incapable.

[1] As set forth in his pamphlet, *Man versus the State.*

(9) Care and cultivation of forests and like matters, such as the stocking of rivers with fish.

(10) Sumptuary laws, such as 'prohibition' laws, for example.

1480. These are all functions which, in one shape or another, all governments alike have undertaken. Changed conceptions of the nature and duty of the state have arisen, issuing from changed historical conditions, deeply altered historical circumstances; and part of the change which has thus affected the idea of the state has been a change in the method and extent of the exercise of governmental functions; but changed conceptions have left the functions of government *in kind* the same. Diversities of conception are very much more marked than diversities of practice.

1481. The following may be mentioned among ministrant functions not included under any of the foregoing heads, and yet undertaken by more than one modern government: the maintenance of savings-banks, especially for small sums (*e.g.*, the English postal savings-bank), the issuance of loans to farmers, and the maintenance of agricultural institutes (as in France), and the establishment of insurance for workingmen (as in Germany).

1482. **History of Governmental Function: Province of the Ancient State.** — Notable contrasts both of theory and of practice separate governments of the ancient omnipotent type from governments of the modern constitutional type. The ancient State, standing very near, as it did, in its thought, to that time, still more remote, when the State was the Kin, knew nothing of individual rights as contrasted with the rights of the state. "The nations of Italy," says Mommsen, "did not merge into that of Rome more completely than the single Roman burgess merged in the Roman community." And Greece was not a whit behind Rome in the absoluteness with which she held the subordination of the individual to the state.

1483. This thought is strikingly visible in the writings of Plato and Aristotle, not only in what they say, but also, and even more, in what they do not say. The ideal Republic of which Plato dreams is to prescribe the whole life of its citizens; but there is no suggestion that it is to be set up under cover of any new conception as to what the state may legitimately do, — it is only to make novel experiments in legislation under the *old* conception. And Aristotle's objection to the utopian projects of his master is not that they would be socialistic (as we should say), but merely that they would be unwise. He does not fear that in

such a republic the public power would prove to have been exalted too high; but, speaking to the policy of the thing, he foresees that the citizens would be poor and unhappy. The state may do what it will, but let it be wise in what it does. There is no one among the Greeks to deny that it is the duty of the state to make its citizens happy and prosperous; nay, to *legislate* them happy, if legislation may create fair skies and a kind fortune; the only serious quarrel concerns the question, What laws are to be tried to this end?

1484. **Roman Conception of Private Rights.** — Roman principles, though equally extreme, were in some respects differently cast. That superior capacity for the development of law, which made the Romans singular among the nations of antiquity, showed itself in respect of the functions of government in a more distinct division between public and private rights than obtained in the polity of the Greek cities. An examination of the conception of the state held in Rome reveals the singular framework of her society. The Roman family did not suffer that complete absorption into the City which so early overtook the Greek family. Private rights were not individual rights, but family rights: and family rights did not so much curtail as supplement the powers of the community. The family was an indestructible *organ of the state.* The father of a family, or the head of a *gens*, was in a sense a member of the official hierarchy of the City, — as the king, or his counterpart the consul, was a greater father. There was no distinction of principle between the power of king or consul and the power of a father; it was a mere difference of sphere, a division of functions.

1485. A son was, for instance, in some things exempt from the authority of the City only because he was in those things still subject, because his father still lived, to the dominion of that original state, the family. There was not in Rome that separation of the son from the family at majority which characterizes the Greek polity, as it now characterizes our own. The father continued to be a ruler, an hereditary state officer, within the original sphere of the family life, the large sphere of individual privilege and property.

1486. This essential unity of state and family furnishes us with the theoretic measure of state functions in Rome. The Roman burgess was subordinated, not to the public authority exactly, but rather to the *public order*, to the conservative in-

tegrity of the community. He was subject to a law which embodied the steady, unbroken habit of the State-family. He was not dominated, but merged.

1487. **Powers of the Roman Senate.** — The range of state power in ancient times, as a range broken only by limits of habit and convenience, is well illustrated in the elastic functions of the Roman Senate during the period of the Republic. With an unbroken life which kept it conscious of every tradition and familiar with every precedent; with established standards of tested experience and cautious expediency, it was able to direct the movements of the compact society at whose summit it sat, as the brain and consciousness direct the movements of the human body; and it is evident from the freedom of its discussions and the frequency of its action upon interests of every kind, whether of public or of private import, that the Roman state, as typified in its Senate, was in its several branches of family, tribe, and City, a single undivided whole, and that its prerogatives were limited by nothing save religious observance and fixed habit. Of that individual liberty which we cherish it knew nothing. (Compare secs. 173, 174.)

1488. **Government the Embodiment of Society.** — As little was there in Greek politics any seed of the thought which would limit the sphere of governmental action by principles of inalienable individual rights. Both in Greek and in Roman conception government was as old as society, — was indeed nothing less than the express image and embodiment of society. In government society lived and moved and had its being. Society and government were one, in some such sense as the spirit and body of man are one: it was through government, as through mouth and eyes and limbs, that society realized and gave effect to its life. Society's prejudices, habits, superstitions, did indeed command the actions of government; but only because society and government were one and the same, not because they were distinct and the one subordinate to the other. In plain terms, the functions of government had no limits of principle, but only certain limits of wont and convenience, and the object of administration was nothing less than to help society on to all its ends: to speed and facilitate all social undertakings. So far as full citizens of the state were concerned, Greek and Roman alike was what we should call a socialist; though he was too much in the world of affairs and had too keen an appreciation of experience,

too keen a sense of the sane and possible, to attempt the Utopias of which the modern socialist dreams, and with which the ancient citizen's own writers sometimes amused him. He bounded his politics by common sense, and so dispensed with 'the rights of man.'

1489. **Feudalism: Functions of Government Functions of Proprietorship.** — Individual rights, after having been first heralded in the religious world by the great voice of Christianity, broke into the ancient political world in the person of the Teuton. But the new politics which the invader brought with him was not destined to establish at once democratic equality: that was a work reserved for the transformations of the modern world. During the Middle Ages, government, as we conceive it, may be said to have suffered eclipse. In the Feudal System the constituent elements of government fell away from each other. Society was drawn back to something like its original family groups. Conceptions of government narrowed themselves to small territorial connections. Men became sovereigns in their own right by virtue of owning land in their own right. There was no longer any conception of nations or societies as wholes. Union there was none, but only interdependence. Allegiance bowed, not to law or to fatherhood, but to ownership. The functions of government under such a system were simply the functions of proprietorship, of command and obedience: "I say unto one, Go, and he goeth; and to another, Come, and he cometh; and to my servant, Do this, and he doeth it." The public function of the baron was to keep peace among his liegemen, to see that their properties were enjoyed according to the custom of the manor (if the manor had been suffered to acquire custom on any point), and to exact fines of them for all privileges, whether of marrying, of coming of age, or of making a will. The baronial conscience, bred in cruel, hardening times, was the only standard of justice; the baronial power the only conclusive test of prerogative.

1490. This was between baron and vassal. Between baron and baron the only bond was a nominal common allegiance to a distant king, who was himself only a greater baron. For the rest there was no government, but only diplomacy and warfare.

Government lived where it could and as it could, and was for the most part divided out piecemeal to a thousand petty holders. Armed feuds were the usual processes of justice.

1491. **The Feudal Monarchy.** — The monarchy which grew out of the ruins of this disintegrate system concentrated authority without much changing its character. The old idea, born of family origins, that government was but the active authority of society, the magistrate but society's organ, bound by society's immemorial laws, had passed utterly away, and government had become the personal possession of one man. The ruler did not any longer belong to the state; the state belonged to him: he was himself the state, as the rich man may be said to be his possessions. The Greek or Roman official was wielded by the community. Not so the king who had swept together into his own lap the powers once broadcast in the feudal system: he wielded the community. Government breathed with his breath, and it was its function to serve him. The state had become, by the processes of the feudal development, his private estate.

1492. **Modern De-socialization of the State.** — The reaction from such conceptions, slow and for the most part orderly in England, sudden and violent, because long forcibly delayed, on the Continent, was natural, and indeed inevitable. When it came it was radical; but it did not swing the political world back to its old-time ideas; it turned it aside rather to new. The ancient man had had no thought but to live loyally the life of society; but it became the object of the revolutionist and the democrat of the new order of things to live his own life. The antique citizen's virtues were not individual in their point of view, but social; whereas our virtues are almost entirely individual in their motive, social only in some of their results.

1493. In brief, the modern State has been largely *de-socialized*. The modern idea is this: the state no longer absorbs the individual; it only serves him. The state, as it appears in its organ, the government, is the representative of the individual, and not his representative even except within the definite commission of constitutions; while for the rest each man makes his own social relations. 'The individual for the State' has been reversed and made to read, 'The State for the individual.'

1494. **More Changes of Conception than of Practice.** — Such are the divergencies of *conception* separating modern from ancient politics, divergencies at once deep and far-reaching. How far have such changes of thought been accompanied by changes of function? By no means so far as might be expected. Apparently the new ideas which have been given prevalence in politics from time to time have not been able to translate themselves into altered functions, but only into somewhat *curtailed* functions, breeding rather a difference of degree than a difference of kind. Even under the most liberal of our modern constitutions we still meet government in almost every field of social endeavor. Our modern life is so infinitely wide and complex, it is true, that we may go great distances in any field of enterprise without receiving either direct aid or direct check from government; but that is only because every field of enterprise is vastly big nowadays, not because government is not somewhere in it: and we know that the tendency is for governments to make themselves everywhere more and more conspicuously present. We are conscious that we are by no means in the same case with the Greek or Roman: the state is ours, not we the state's. But we know at the same time that the tasks of the state have not been much diminished. Perhaps we may say that the matter stands thus: what is changed is not the activities of government but only the morals, the conscience of government. Government may still be doing substantially the same things as of old; but an altered conception of its responsibility deeply modifies *the way in which it does them.* Social convenience and advancement are still its ultimate standard of conduct, just as if it were still itself the omnipotent impersonation of society, the master of the individual; but it has adopted new ideas as to what constitutes social convenience and advancement. Its aim is to aid the individual to the fullest and best possible realization of his individuality, instead of merely to the full realization of his *sociality.* Its plan is to create the best and fairest opportunities for the individual; and it has discovered that the way to do this is by no means itself to undertake the administration of the individual by old-time futile methods of guardianship.

1495. **Functions of Government much the Same now as always.** — This is indeed a great and profound change; but it is none the

less important to emphasize the fact that the functions of government are still, when catalogued, found to be much the same both in number and magnitude that they always were. Government does not stop with the protection of life, liberty, and property, as some have supposed; it goes on to serve every convenience of society. Its sphere is limited only by its own wisdom, alike where republican and where absolutist principles prevail.

1496. **The State's Relation to Property.** — A very brief examination of the facts suffices to confirm this view. Take, for example, the state's relation to property, its performance of one of the chief of those functions which I have called Constituent. It is in connection with this function that one of the most decided contrasts exists between ancient and modern political practice; and yet we shall not find ourselves embarrassed to recognize as natural the practice of ancient states touching the right of private property. Their theory was extreme, but, outside of Sparta, their practice was moderate.

1497. **In Sparta.** — Consistent, logical Sparta may serve as the point of departure for our observation. She is the standing classical type of exaggerated state functions and furnishes the most extreme example of the antique conception of the relations of the state to property. In the early periods of her history at least, besides being censor, pedagogue, drill sergeant, and housekeeper to her citizens, she was also universal landlord. There was a distinct reminiscence in her practice of the time when the state was the family, and as such the sole owner of property. She was regarded as the original proprietor of all the land in Laconia, and individual tenure was looked upon as rather of the nature of a usufruct held of the state and at the state's pleasure than as resting upon any complete or indefeasible private title. (Compare sec. 105.)

1498. **Peculiar Situation of the Spartans.** — There were in Sparta special reasons for the persistence of such a system. The Spartans had come into Laconia as conquerors, and the land had first of all been tribal booty. It had been booty of which the Spartan host as a whole, as a state, had had the dividing, and it had been the purpose of the early arrangement to make the division of the land among the Spartan families as equal as possible. Nor did the state resign the right of disposition in making this first distribution. It remained its primary care to keep its citizens, the favored *Spartiatæ*, upon an equal footing of fortune, to the

end that they might remain rich in leisure, and so be the better able to live entirely for the service of the state, which was honorable, to the avoidance of that pursuit of wealth which was dishonorable. The state, accordingly, undertook to administer the wealth of the country for the benefit of its citizens. When grave inequalities manifested themselves in the distribution of estates it did not hesitate to resume its proprietary rights and effect a reapportionment; no one dreaming, the while, of calling its action confiscation. It took various means for accomplishing its ends. It compelled rich heiresses to marry men without patrimony; and it grafted the poor citizen upon a good estate by means of prescribed adoption. No landed estate could be alienated either by sale or testament from the family to which the state had assigned it unless express legislative leave were given. In brief, in respect of his property the citizen was both ward and tenant of the state.

1499. **Decay of the System.** — As the Spartan state decayed this whole system was sapped. Estates became grossly unequal, as did also political privileges even among the favored *Spartiatæ*. But these changes were due to the decadence of Spartan power and to the degeneration of her political fibre in days of waning fortune, not to any conscious or deliberate surrender by the state of its prerogatives as owner, guardian, and trustee. She had grown old and lax simply; she had not changed her mind.

1500. **In Athens.** — When we turn to Athens we experience a marked change in the political atmosphere, though the Athenians hold much the same abstract conception of the state. Here men breathe more freely and enjoy the fruits of their labor, where labor is without reproach, with less restraint. Even in Athens there remain distinct traces, nevertheless, of the family duties of the state. She too, like Sparta, felt bound to dispose properly of eligible heiresses. She did not hesitate to punish with heavy forfeiture of right (*atimia*) those who squandered their property in dissolute living. There was as little limit in Athens as in Sparta to the theoretical prerogatives of the public authority. The freedom of the citizen was a freedom of indulgence rather than of right: he was free because the state refrained, — as a privileged child, not as a sovereign under Rousseau's Law of Nature.

1501. **In Rome.** — When we shift our view to republican Rome we do not find a simple city omnipotence like that of Greece, in

which all private rights are sunk. The primal constituents of the city yet abide in shapes something like their original. Roman society consists of a series of interdependent links: the family the *gens*, the city. The aggregate, not the fusion, of these makes up what we should call the state. But the state, so made up, was omnipotent, through one or other of its organs, over the individual. Property was not private in the sense of being individual; it vested in the family, which was, in this as in other respects, an organ of the state. Property was not conceived of as state property, because it had remained the undivided property of the family. The father, as a ruler in the immemorial hierarchy of the government, was all-powerful trustee of the family estates; individual ownership there was none.

1502. **Under Modern Governments.** — We with some justice felicitate ourselves that to this omnipotence of the ancient state in its relations to property the practice of our own governments offers the most pronounced contrasts. But the point of greatest interest for us in the present connection is this, that these contrasts are contrasts of *policy, not of power.* To what lengths it will go in regulating property rights is for each government a question of principle, which it must put to its own conscience, and which, if it be wise, it will debate in the light of political history: but every government must regulate property in one way or another and may regulate it as much as it pleases. If the ancient state was regarded as the ultimate owner, the modern state is regarded as the ultimate heir of all estates. Failing other claimants, property *escheats* to the state. If the modern state does not assume, like the ancient, to administer their property upon occasion for competent adults, it does administer their property upon occasion for lunatics and minors. The ancient state controlled slaves and slavery. The modern state has been quite as absolute: it has abolished slaves and slavery. The modern state, no less than the ancient, sets rules and limitations to inheritance and bequest. Most of the more extreme and hurtful interferences with rights of private ownership government has abandoned, one may suspect, rather because of difficulties of administration than because of difficulties of conscience. It is of the nature of the state to regulate property rights; it is of the policy

of the state to regulate them *more* or *less*. Administrators must regard this as one of the Constituent functions of political society.

1503. **The State and Political Rights.** — Similar conclusions may be drawn from a consideration of the contrasts which exist in the field of that other Constituent function which concerns the determination of political rights, — the contrasts between the *status* of the citizen in the ancient state and the *status* of the citizen in the modern state. Here also the contrast, as between state and state, is not one of power, but one of principle and habit rather. Modern states have often limited as narrowly as did the ancient the enjoyment of those political privileges which we group under the word *Franchise*. They, too, as well as the ancient states, have admitted slavery into their systems; they too have commanded their subjects without moderation and fleeced them without compunction. But for all they have been so omnipotent, and when they chose so tyrannical, they have seldom insisted upon so complete and unreserved a service of the state by the citizen as was habitual to the political practice of both the Greek and the Roman worlds. The Greek and the Roman belonged each to his state in a quite absolute sense. He was his own in nothing as against the claims of his city upon him: he freely acknowledged all his privileges to be but concessions from his mother, the commonwealth. Those privileges accrued to him through law, as do ours; but law was to him simply the will of the organic community; never, as we know it in our constitutions, a restraint upon the will of the organic community. He knew no principles of liberty save only those which custom had built up: which inhered, not in the nature of things, not in abstract individuality, but in the history of affairs, in concrete practice. His principles were all precedents. Nevertheless, however radically different its doctrines, the ancient state was not a whit more completely master touching laws of citizenship than the state of to-day is.

1504. **As Regards the State's Ministrant Functions.** — Of the Ministrant, no less than of the Constituent functions, the same statement may be made, that practically the state has been relieved of very little duty by alterations of political theory. It is natural enough that in the field of the Constituent functions

the state should serve society now as always; in this field of the Ministrant functions one would expect the state to be less active now than formerly. But there is in fact no such difference: *government does now whatever experience permits or the times demand;* and though it does not do exactly the same things it still does substantially the same kind of things that the ancient state did. It will conduce to clearness if I set forth my illustrations of this in the order of the list of Ministrant functions which I have given (sec. 1479).

1505. (1) **The State in Relation to Trade.** — All nations have habitually regulated trade and commerce. In the most remote periods of which history has retained any recollection the regulation of trade and commerce was necessary to the existence of government. The only way in which communities which were then seeking to build up a dominant power could preserve an independent existence and work out an individual development was to draw apart to an absolutely separate life. Commerce meant contact; contact meant contamination: the only way in which to develop character and achieve cohesion was to avoid intercourse. In the classical states this stage is passed and trade and commerce are regulated for much the same reasons that induce modern states to regulate them, in order, that is, to secure commercial advantage as against competitors or in order to serve the fiscal needs of the state. Athens and Sparta and Rome, too, regulated the corn trade for the purpose of securing for their citizens full store of food. In the Middle Ages the feuds and highway brigandage of petty lords loaded commerce with fetters of the most harassing sort, except where the free cities could by militant combination keep open to it an unhindered passage to and fro between the great marts of North and South. As the mediæval states emerge into modern times we find trade and commerce handled by statesmen as freely as ever, but according to the reasoned policy of the mercantilist thinkers; and in our own days according to still other conceptions of national advantage.

1506. (2) **The State in Relation to Labor.** — Labor, too, has always been regulated by the state. By Greek and Roman the labor of the handicrafts and of agriculture, all manual toil

indeed, was for the most part given to slaves to do; and of course law regulated the slave. In the Middle Ages the labor which was not agricultural and held in bondage to feudal masters was in the cities, where it was rigidly ordered by the complex rules of the guild system, as were trade also and almost all other like forms of making a livelihood. Where, as in England, labor in part escaped from the hard service of the feudal tenure the state stepped in with its persistent "statutes of laborers" and sought to tie the workman to one habitation and to one rate of wages. 'The rustic must stay where he is and must receive only so much pay,' was its command. Apparently, however, all past regulation of labor was but timid and elementary as compared with the labor legislation about to be tried by the governments of our own day. The birth and development of the modern industrial system has changed every aspect of the matter; and this fact reveals the true character of the part which the state plays in the case. The rule would seem to be that in proportion as the world's industries grow must the state advance in its efforts to assist the industrious to advantageous relations with each other. The tendency to regulate labor rigorously and minutely is as strong in England, where the state is considered the agent of the citizen, as it was in Athens, where the citizen was deemed the child and tool of the state, and where the workman was a slave.

1507. (3) **Regulation of Corporations.** — The regulation of corporations is but one side of the modern regulation of the industrial system, and is a function added to the antique list of governmental tasks.

1508. (4) **The State and Public Works.** — The maintenance of thoroughfares may be said to have begun with permanent empire, that is to say, for Europe, with the Romans. For the Romans, indeed, it was first a matter of moving armies, only secondarily a means of serving commerce; whereas with us the highway is above all things else an artery of trade, and armies use it only when commerce stands still at the sound of drum and trumpet. The building of roads may therefore be said to have begun by being a Constituent function and to have ended by becoming a Ministrant function of government. But the same is not true of other public works, of the Roman aqueducts and theatres and

baths, and of modern internal improvements. They, as much as the Roman tax on old bachelors, are parts, not of a scheme of governing, but of plans for the advancement of other social aims, — for the administration of society. Because in her conception the community as a whole was the only individual, Rome thrust out as of course her magnificent roads to every quarter of her vast territory, considered no distances too great to be traversed by her towering aqueducts, deemed it her duty to clear river courses and facilitate by every means both her commerce and her arms. And the modern state, though holding a deeply modified conception of the relations of government to society, still follows a like practice. If in most instances our great iron highways are left to private management, it is oftener for reasons of convenience than for reasons of conscience.

1509. (5) **Administration of the Conveniences of Society.** — Similar considerations apply in the case of that modern instrumentality, the public letter-post, in the case of the still more modern manufacture of gas, and in the case of the most modern telegraph. The modern no less than the ancient government unhesitatingly takes a hand in administering the conveniences of society.

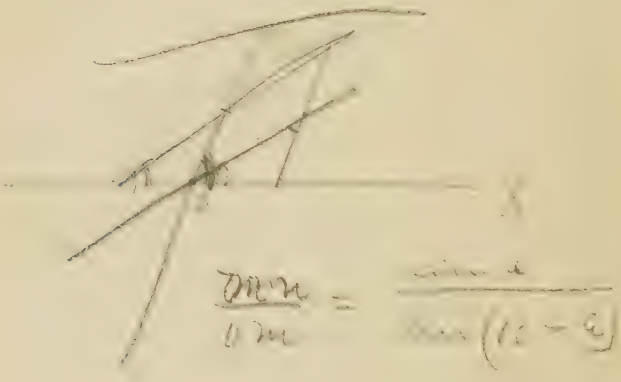
1510. (6) **Sanitation.** — Modern governments, like the government of Rome, maintain sanitation by means of police inspection of baths, taverns, and houses of ill fame, as well as by drainage; and to these they add hospital relief, water supply, quarantine, and a score of other means.

1511. (7) **Public Education.** — Our modern systems of public education are more thorough than the ancient, notwithstanding the fact that we regard the individual as something other than a mere servant of the state, and educate him first of all for himself.

1512. (8) **Sumptuary Laws.** — In sumptuary laws ancient states of course far outran modern practice. Modern states have foregone most attempts to make citizens virtuous or frugal by law. But even we have our prohibition enactments; and we have had our fines for swearing.

1513. **Summary.** — Apparently it is safe to say with regard to the functions of government taken as a whole that, even as between ancient and modern states, uniformities of practice far out-

number diversities of practice. One may justly conclude, not indeed that the restraints which modern states put upon themselves are of little consequence, or that altered political conceptions are not of the greatest moment in determining important questions of government and even the whole advance of the race; but that it is rather by gaining practical wisdom, rather by long processes of historical experience, that states modify their practices. New theories are subsequent to new experiences.



XVI.

THE OBJECTS OF GOVERNMENT.

1514. **Character of the Subject.** — Political interest and controversy centre nowhere more acutely than in the question, What are the proper objects of government? This is one of those difficult questions upon which it is possible for many sharply opposed views to be held apparently with almost equal weight of reason. Its central difficulty is this, that it is a question which can be answered, if answered at all, only by the aid of a broad and careful wisdom whose conclusions are based upon the widest possible inductions from the facts of political experience in all its phases. Such wisdom is quite beyond the capacity of most thinkers and actors in the field of politics; and the consequence has been that this question, perhaps more than any other in the whole scope of political science, has provoked great wars of doctrine.

1515. **The Extreme Views held.** — What part shall government play in the affairs of society? — that is the question which has been the gauge of controversial battle. *What ought the functions of government to be?* On the one hand there are extremists who cry constantly to government, 'Hands off,' '*laissez faire*,' '*laissez passer*,' who look upon every act of government which is not merely an act of police with jealousy; who regard government as necessary, but as a necessary evil; and who would have government hold back from everything which could by any possibility be accomplished by individual initiative and endeavor. On the other hand, there are those who, with equal extremeness of view in the opposite direction, would have society lean fondly upon government for guidance and assistance in every affair of life; who, captivated by some glimpse of public power and benefi-

cence caught in the pages of ancient or mediæval historian, or by some dream of coöperative endeavor cunningly imagined by the great fathers of Socialism, believe that the state can be made a wise foster mother to every member of the family politic. Between these two extremes, again, there are all grades, all shades and colors, all degrees of enmity or of partiality to state action.

1516. **Historical Foundation for Opposite Views.** — Enmity to exaggerated state action, even a keen desire to keep that action down to its lowest possible terms, is easily furnished with impressive justification. It must unreservedly be admitted that history abounds with warnings of no uncertain sort against indulging the state with a too great liberty of interference with the life and work of its citizens. Much as there is that is attractive in the political life of the city states of Greece and Rome, in which the public power was suffered to be omnipotent, — their splendid public spirit, their incomparable organic wholeness, their fine play of rival talents, serving both the common thought and the common action, their variety, their conception of public virtue, — there is also much to blame, — their too wanton invasion of that privacy of the individual life in which alone family virtue can dwell secure, their callous tyranny over minorities in matters which might have been left to individual choice, their sacrifice of personal independence for the sake of public solidarity, their hasty average judgments, their too confident trust in the public voice. They, it is true, could not have had the individual liberty which we cherish without breaking violently with their own history, with the necessary order of their development; but neither can we, on the other hand, imitate them without an equally violent departure from our own normal development and a reversion to the now too primitive methods of their pocket republics.

1517. Unquestionable as it is that mediæval history affords many seductive examples of an absence of grinding, heartless competition and a strength of mutual interdependence, confidence, and helpfulness between class and class such as the modern economist may be pardoned for wishing to see revived; and true though it be that the history of Prussia under some of the greater Hohenzollern gives at least colorable justification to the

opinion that state interference may under many circumstances be full of benefit for the industrial upbuilding of a state, it must, on the other hand, be remembered that neither the feudal system, nor the mediæval guild system, nor the paternalism of Frederic the Great can be rehabilitated now that the nineteenth century has wrought its revolutions in industry, in church, and in state; and that, even if these great systems of the past could be revived, we should be sorely puzzled to reinstate their blessings without restoring at the same time their acknowledged evils. No student of history can wisely censure those who protest against state paternalism.

1518. **The State a Beneficent and Indispensable Organ of Society.** — It by no means follows, nevertheless, that because the state may unwisely interfere in the life of the individual, it must be pronounced in itself and by nature a necessary evil. It is no more an evil than is society itself. It is the organic body of society: without it society would be hardly more than a mere abstraction. If the name had not been restricted to a single, narrow, extreme, and radically mistaken class of thinkers, we ought all to regard ourselves and to act as *socialists*, believers in the wholesomeness and beneficence of the body politic. If the history of society proves anything, it proves the absolute naturalness of government, its rootage in the nature of man, its origin in kinship, and its identification with all that makes man superior to the brute creation. Individually man is but poorly equipped to dominate other animals: his lordship comes by combination, his strength is concerted strength, his sovereignty is the sovereignty of union. Outside of society man's mind can avail him little as an instrument of supremacy; and government is the visible form of society. If society itself be not an evil, neither surely is government an evil, for government is the indispensable organ of society.

1519. Every means, therefore, by which society may be perfected through the instrumentality of government, every means by which individual rights can be fitly adjusted and harmonized with public duties, by which individual self-development may be made at once to serve and to supplement social development, ought certainly to be diligently sought, and, when found, sedu-

lously fostered by every friend of society. Such is the socialism to which every true lover of his kind ought to adhere with the full grip of every noble affection that is in him.

1520. **Socialism and the Modern Industrial Organization.** — It is possible indeed, to understand, and even in a measure to sympathize with, the enthusiasm of those special classes of agitators whom we have dubbed with the too great name of 'Socialists.' The schemes of social reform and regeneration which they support with so much ardor, however mistaken they may be, — and surely most of them are mistaken enough to provoke the laughter of children, — have the right end in view: they seek to bring the individual with his special interests, personal to himself, into complete harmony with society with its general interests, common to all. Their method is always some sort of coöperation, meant to perfect mutual helpfulness. They speak, too, a revolt from selfish, misguided individualism; and certainly modern individualism has much about it that is hateful, too hateful to last. The modern industrial organization has so distorted competition as sometimes to put it into the power of some to tyrannize over many, as to enable the rich and the strong to combine against the poor and the weak. It has given a woful material meaning to that spiritual law that "to him that hath shall be given, and from him that hath not shall be taken away even the little that he seemeth to have."[1] It has magnified that self-interest which is grasping selfishness and has thrust out love and compassion not only, but free competition in part, as well. Surely it would be better, exclaims the Socialist, altogether to stamp out competition by making all men equally subject to the public order, to an imperative law of social coöperation! But the Socialist mistakes: it is not competition that kills, but unfair competition, the pretence and form of it where the substance and reality of it cannot exist.

1521. **A Middle Ground.** — And there is a middle ground. The schemes which Socialists have proposed society cannot accept and live; and no scheme which involves the complete control of the individual by government can be devised which differs from theirs very much for the better. A truer doctrine must be found, which

[1] Compare F. A. Walker's *Political Economy* (Advanced Course), sec. 346.

gives wide freedom to the individual for his self-development and yet guards that freedom against the competition that kills, and reduces the antagonism between self-development and social development to a minimum. And such a doctrine can be formulated, surely, without too great vagueness.

1522. **The Objects of Society the Objects of Government.** — Government, as I have said, is the organ of society, its only potent and universal instrument: its objects must be the objects of society. What, then, are the objects of society? What *is* society? It is an organic association of individuals for mutual aid. Mutual aid to what? To self-development. The hope of society lies in an infinite individual variety, in the freest possible play of individual forces: only in that can it find that wealth of resource which constitutes civilization, with all its appliances for satisfying human wants and mitigating human sufferings, all its incitements to thought and spurs to action. It should be the end of government *to assist in accomplishing the objects of organized society.* There must be constant adjustments of governmental assistance to the needs of a changing social and industrial organization. Not license of interference on the part of government, but only strength, and adaptation of regulation. The regulation that I mean is not interference: it is the equalization of conditions, so far as possible, in all branches of endeavor; and the equalization of conditions is the very opposite of interference.

1523. Every rule of development is a rule of adaptation, a rule for meeting 'the circumstances of the case'; but the circumstances of the case, it must be remembered, are not, so far as government is concerned, the circumstances of any individual case, but the circumstances of society's case, the general conditions of social organization. The case for society stands thus: the individual must be assured the best means, the best and fullest opportunities, for complete self-development: in no other way can society itself gain variety and strength. But one of the most indispensable conditions of opportunity for self-development government alone, society's controlling organ, can supply. All combinations which necessarily create monopoly, which necessarily put and keep indispensable means of industrial or social development in the hands of a few, and those few, not the few selected by society

itself, but the few selected by arbitrary fortune, must be under either the direct or the indirect control of society. To society alone can the power of dominating by combination belong. It cannot suffer any of its members to enjoy such a power for their own private gain independently of its own strict regulation or oversight.

1524. **Natural Monopolies.** — It is quite possible to distinguish natural monopolies from other classes of undertakings; their distinctive marks are thus enumerated by Sir T. H. Farrer in his excellent little volume on *The State in its Relation to Trade* which forms one of the well-known English Citizen series:[1]

"1. What they supply is a necessary," a necessary, that is, to life, like water, or a necessary to industrial action, like railroad transportation.

"2. They occupy peculiarly favored spots or lines of land." Here again the best illustration is afforded by railroads or by telegraph lines, by water-works, etc.

"3. The article or convenience they supply is used at the place and in connection with the plant or machinery by which it is supplied"; that is to say, at the favored spots or along the favored lines of land.

"4. This article or convenience can in general be largely, if not indefinitely increased, without proportionate increase in plant and capital"; that is to say, the initial outlay having been made, the favored spot or line of land having been occupied, every subsequent increase of business will increase profits because it will not proportionately, or anything like proportionately, increase the outlay for services or machinery needed. Those who are outside of the established business, therefore, are upon an equality of competition neither as regards available spots or lines of land nor as regards opportunities to secure business in a competition of rates.

"5. Certain and harmonious arrangement, which can only be attained by unity, are paramount considerations." Wide and systematic organization is necessary.

1525. Such enterprises invariably give to a limited number of persons the opportunity to command certain necessaries of life, of comfort, or of industrial success against their fellow-countrymen and for their own

[1] P. 71. Sir Thomas Farrer is Permanent Secretary of the English Board of Trade (sec. 876).

advantage. Once established in any field, there can be no real competition between them and those who would afterwards enter that field. No agency should be suffered to have such control except a public agency which may be compelled by public opinion to act without selfish narrowness, upon perfectly equal conditions as towards all, or some agency upon which the government may keep a strong hold of regulation.

1526. **Control not necessarily Administration.** — Society can by no means afford to allow the use for private gain and without regulation of undertakings necessary to its own healthful and efficient operation and yet of a sort to exclude equality in competition. Experience has proved that the self-interest of those who have controlled such undertakings for private gain is not coincident with the public interest: even enlightened self-interest may often discover means of illicit pecuniary advantage in unjust discriminations between individuals in the use of such instrumentalities. But the proposition that the government should control such dominating organizations of capital may by no means be wrested to mean by any necessary implication that the government should itself administer those instrumentalities of economic action which cannot be used except as monopolies. In such cases, as Sir T. H. Farrer says, "there are two great alternatives. (1) Ownership and management by private enterprise and capital under regulation by the state. (2) Ownership and management by Government, central or local." Government regulation may in most cases suffice. Indeed, such are the difficulties in the way of establishing and maintaining careful business management on the part of government, that control ought to be preferred to direct administration in as many cases as possible, — in every case in which control without administration can be made effectual.

1527. **Equalization of Competition.** — There are some things outside the field of natural monopolies in which individual action cannot secure equalization of the conditions of competition; and in these also, as in the regulation of monopolies, the practice of governments, of our own as well as of others, has been decisively on the side of governmental regulation. By forbidding child labor, by supervising the sanitary conditions of factories, by limiting the employment of women in occupations hurtful to their health, by instituting official tests of the purity or the quality of

goods sold, by limiting hours of labor in certain trades, by a hundred and one limitations of the power of unscrupulous or heartless men to out-do the scrupulous and merciful in trade or industry, government has assisted equity. Those who would act in moderation and good conscience in cases where moderation and good conscience, if indulged, require an increased outlay of money, in better ventilated buildings, in greater care as to the quality of goods, etc., cannot be expected to act upon their principles so long as more grinding conditions for labor or a more unscrupulous use of the opportunities of trade secure to the unconscientious an unquestionable and sometimes even a permanent advantage; they have only the choice of denying their consciences or retiring from business. In scores of such cases government has intervened and will intervene; but by way, not of interference, by way, rather, of making competition equal between those who would rightfully conduct enterprise and those who basely conduct it. It is in this way that society protects itself against permanent injury and deterioration, and secures healthful equality of opportunity for self-development.

1528. **Society greater than Government.** — Society, it must always be remembered, is vastly bigger and more important than its instrument, Government. Government should serve Society, by no means rule or dominate it. Government should not be made an end in itself; it is a means only, — a means to be freely adapted to advance the best interests of the social organism. The State exists for the sake of Society, not Society for the sake of the State.

1529. **Natural Limits to State Action.** — And that there are natural and imperative limits to state action no one who seriously studies the structure of society can doubt. The limit of state functions is the limit of *necessary coöperation* on the part of Society as a whole, the limit beyond which such combination ceases to be imperative for the public good and becomes merely convenient for industrial or social enterprise. Coöperation is necessary in the sense here intended when it is indispensable to the equalization of the conditions of endeavor, indispensable to the maintenance of uniform rules of individual rights and relationships, indispensable because to omit it would inevitably be to

hamper or degrade some for the advancement of others in the scale of wealth and social standing.

1530. There are relations in which men invariably have need of each other, in which universal coöperation is the indispensable condition of even tolerable existence. Only some universal authority can make opportunities equal as between man and man. The divisions of labor and the combinations of commerce may for the most part be left to contract, to free individual arrangement, but the equalization of the conditions which affect all alike may no more be left to individual initiative than may the organization of government itself. Churches, clubs, corporations, fraternities, guilds, partnerships, unions, have for their ends one or another special enterprise for the development of man's spiritual or material well-being: they are all more or less advisable. But the family and the state have as their end a general enterprise for the betterment and equalization of the conditions of individual development: they are indispensable.

1531. The point at which public combination ceases to be imperative is not susceptible of clear indication in general terms; but it is not on that account indistinct. The bounds of family association are not indistinct because they are marked only by the immaturity of the young and by the parental and filial affections, — things not all of which are defined in the law. The rule that the state should do nothing which is equally possible under equitable conditions to optional associations is a sufficiently clear line of distinction between governments and corporations. Those who regard the state as an optional, conventional union simply, a mere partnership, open wide the doors to the worst forms of socialism. Unless the state has a nature which is quite clearly defined by that invariable, universal, immutable mutual interdependence which runs beyond the family relations and cannot be satisfied by family ties, we have absolutely no criterion by which we can limit, except arbitrarily, the activities of the state. The criterion supplied by the native necessity of state relations, on the other hand, banishes such license of state action.

1532. The state, for instance, ought not to supervise private morals because they belong to the sphere of separate individual responsibility, not to the sphere of mutual dependence. Thought and conscience are

private. Opinion is optional. The state may intervene only where common action, uniform law are indispensable. Whatever is merely convenient is optional, and therefore not an affair for the state. Churches are spiritually convenient; joint-stock companies are capitalistically convenient; but when the state constitutes itself a church or a mere business association it institutes a monopoly no better than others. It should do nothing which is not in any case both indispensable to social or industrial life and necessarily monopolistic.

1533. **The Family and the State.** — It is the proper object of the family to mould the individual, to form him in the period of immaturity in the faiths of religion and in the practice of morality and obedience. This period of subordination over, he is called out into an independent, self-directive activity. The ties of family affection still bind him, but they bind him with silken, not with iron bonds. He has left his 'minority' and reached his 'majority.' It is the proper object of the state to give leave to his individuality, in order that that individuality may add its quota of variety to the sum of national activity Family discipline is variable, selective, formative: it must lead the individual. But the state must not lead. It must create conditions, but not mould individuals. Its discipline must be invariable, uniform, impersonal. Family methods rest upon individual inequality, state methods upon individual equality. Family order rests upon tutelage, state order upon franchise, upon privilege.

1534. **The State and Education.** — In one field the state would seem at first sight to usurp the family function, the field, namely, of education. But such is not in reality the case. Education is the proper office of the state for two reasons, both of which come within the principles we have been discussing. Popular education is necessary for the preservation of those conditions of freedom, political and social, which are indispensable to free individual development. And, in the second place, no instrumentality less universal in its power and authority than government can secure popular education. In brief, in order to secure popular education the action of society as a whole is necessary; and popular education is indispensable to that equalization of the conditions of personal development which we have taken to be the proper object of society. Without popular education, moreover, no government

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which rests upon popular action can long endure: the people must be schooled in the knowledge, and if possible in the virtues, upon which the maintenance and success of free institutions depend. No free government can last in health if it lose hold of the traditions of its history, and in the public schools these traditions may be and should be sedulously preserved, carefully replanted in the thought and consciousness of each successive generation.

1535. **Historical Conditions of Governmental Action.** — Whatever view be taken in each particular case of the rightfulness or advisability of state regulation and control, one rule there is which may not be departed from under any circumstances, and that is the rule of historical continuity. In politics nothing radically novel may safely be attempted. No result of value can ever be reached in politics except through slow and gradual development, the careful adaptations and nice modifications of growth. Nothing may be done by leaps. More than that, each people, each nation, must live upon the lines of its own experience. Nations are no more capable of borrowing experience than individuals are. The histories of other peoples may furnish us with light, but they cannot furnish us with conditions of action. Every nation must constantly keep in touch with its past; it cannot run towards its ends around sharp corners.

1536. **Summary.** — This, then, is the sum of the whole matter: the end of government is the facilitation of the objects of society. The rule of governmental action is necessary coöperation. The method of political development is conservative adaptation, shaping old habits into new ones, modifying old means to accomplish new ends.

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